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A  
BRIEF STATEMENT  
OF  
OPINIONS,  
GIVEN IN THE  
BOARD OF COMMISSIONERS,  
Etc. Etc. Etc.







A  
BRIEF STATEMENT  
OF  
OPINIONS,

*K* GIVEN IN THE *Great Britain & Ireland*  
BOARD OF COMMISSIONERS,

UNDER THE SIXTH ARTICLE OF THE TREATY OF AMITY, *See*  
COMMERCE, AND NAVIGATION, WITH GREAT BRITAIN:

WITH  
AN APPENDIX,

CONTAINING

CERTAIN ARTICLES OF THE TREATIES WITH GREAT-  
BRITAIN;—THE COMMISSIONS UNDER THE SAID SIXTH  
ARTICLE OF THE TREATY OF AMITY;—AND  
REFERENCES TO

OPINIONS DELIVERED BY JUDGES  
OF THE SUPREME AND CIRCUIT COURTS OF THE  
*UNITED STATES:*

BY ONE OF THE COMMISSIONERS  
UNDER THE SAID SIXTH ARTICLE.

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PHILADELPHIA:

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1800.

BRIEF STATEMENT

OF THE

BOARD OF COMMISSIONERS

OF THE LAND OFFICE OF THE UNITED STATES OF AMERICA

AND



REFERENCE TO

OF THE LAND OFFICE OF THE UNITED STATES OF AMERICA

AND

OF THE LAND OFFICE OF THE UNITED STATES OF AMERICA

BY ONE OF THE COMMISSIONERS

AND

OF THE LAND OFFICE OF THE UNITED STATES OF AMERICA

AND

OF THE LAND OFFICE OF THE UNITED STATES OF AMERICA

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## ADVERTISEMENT.

SO many misapprehensions prevail respecting the proceedings of the Commission under the sixth article of the Treaty of Amity with Great Britain, that the following brief statement, (in general without commentary or defence) of the leading points which came under discussion, and the opinions which were actually given, cannot be useless, or improper. It has been lately drawn up by one of the Commissioners who concurred in those opinions; and who, for reasons which some will understand, takes this opportunity of declaring, that, notwithstanding the inducements he may have felt, he has never published, or been privy to the publication, in this country, or elsewhere, in news-papers or otherwise, of a single word on the subject; the detached minutes occasionally printed by agents, for the information of parties, and generally with the permission, or knowledge of the Board, only excepted.—With the consciousness of a just purpose; the concurrence of two other mem-



bers of the Commission, whose honourable habits of mind he has had so much occasion to know and to respect; the assurance of subsequent reflection; and the coincidence, in principle and interpretation, between the opinions of the Board, or a majority of the Commissioners, as recorded in their Journals, and now abridged; and those which, since the treaty of amity, have been solemnly and unanimously delivered, by the learned and respectable Judges of the United States; he can feel no other solicitude, than that which must arise from the respect he entertains, for many of those numerous individuals in this country, who are said to think differently.—To that respect, which, without official impropriety, he may thus take occasion to express, is to be ascribed the publication he now offers.

COMMISSIONERS' OFFICE,

PHILADELPHIA, May 15, 1800.

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A  
BRIEF STATEMENT,

&c. &c. &c.

THE Board of Commissioners under the *sixth* article\* of the treaty of amity, navigation, and commerce between his Britannic Majesty and the United States, consisting of the five following members, namely, Mr. Macdonald, Mr. Rich, Mr. Fitzsimons, Mr. Innes, and Mr. Guillemard,† was constituted on the 29th day of May, 1797: and the *general* questions raised before them, with the opinions given, may be thus concisely stated.

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COMMISSIONERS' OFFICE,  
*Philadelphia, January 24, 1798.*

*In the Case of* HENRY HARFORD.

CLAIM for certain arrears which accrued before the peace, of quit rents, manor rents, and alienation

\* See the article at length in the appendix.

† The Commissioners are here named in the order of their appointments.

As the commission was established by the two nations for the purpose, not of negotiating, but of absolutely and finally *deciding* the matter in dispute, it was made to consist of such a number of members as would insure decision by means of a *majority*, in cases of difference of opinion.

The respective commissions by his Britannic Majesty, and by the President, with advice and consent of the Senate of the United States; the appointment of the fifth Commissioner; and the manner of that appointment, will be found in the appendix, N. III.

finer; and also of tonnage duties, which belonged to the claimant as proprietor of the late province of Maryland.

OBJECTION, suggested by one of the British Commissioners, for consideration, before ordering an answer, viz. "that the right, estate, and property on which the claimant founded his demand for the arrears claimed, was one of those 'estates, rights, and properties' the confiscation whereof is recognized by the *fifth* article of the definitive treaty of peace, between his Britannic Majesty and the United States, dated the 3d day of September 1783: that duties on the tonnage of ships, and on tobacco exported, stated as part of the claimant's late revenues, are not in their nature to be considered as debts contracted, within the true intent and meaning of the treaties:" and that the evidence offered would besides be insufficient to substantiate the claim.—Accordingly it was

ORDERED, that the claimant should have leave, by additional memorial, to shew cause, why his claim should not be dismissed, in the whole or in part, upon the above grounds.\*

February 7, 1798.

*In the Case of* GEORGE OSWALD *and others, surviving Partners of* OSWALD, DENNISTOWN, & Co.

THE Board expressed a general opinion respecting the description of parole testimony they would ex-

\* An additional memorial, shewing cause, was received and read on the 19th December, 1798, and the usual order made for an answer on the part of the United States. There the matter rested; but the case is here stated, because an opinion was intimated by the above order.

pect, by the following order; which was this day passed, on the motion of one of the British Commissioners.

“ The claim of George Oswald, &c. &c. signed  
 “ by the general agent, and presented by him this  
 “ day, having been read,—Ordered, (with reservation  
 “ of all other points in the case) that the general  
 “ agent be required to set forth by additional memorial, whether the claimants can offer *further* evidence, to prove the insolvency of the house of Pleasant, Cocke, & Co. and of the partners thereof, as stated in the memorial, by persons who can describe themselves as *having been in a situation to know the fact*, and *able to state circumstances in support of their belief* respecting the same; or otherwise.”



April 18, 1798.

In consequence of an argument which had been maintained before the Board, such as might have warranted conclusions, perhaps beyond the intention with which it was used, an order was, on the motion of one of the British Commissioners, this day unanimously passed, for the information of agents and all concerned; importing, that the Commissioners were not *officially* at liberty to consider, in what manner opinions which they had maturely formed, according to the best of their judgments, on the questions before them, would operate upon, or effect, or be considered by the parties: or, in other words, that no other “*po-*



“*licy*” than that of justice, could be permitted to influence their deliberations.\*

\* On the subject of such arguments, which were afterwards repeated, and had from the beginning been considered by some members of the board as, at least, very unnecessary; one of the Commissioners, for the purpose of *preventing*, if possible, every cause of irritation or offence, and because the question had been put to the Board, in writing, by the attorney general, whether it was the meaning of the above order “that it belonged not to the Board to consider what the United States might think of their awards,” wrote a note “in his private capacity, to the agent for the United States;” and there expressed himself as follows—“It is surely quite sufficient to argue that the case is not within the meaning of the treaty, and try to convince the Commissioners that it is not;—but what avails it to talk of *consequences*, if they are *not* convinced? Can men of honor for one instant suffer the consideration to occupy their minds, and reason thus: ‘We are convinced that the case is within the treaty, and according to our consciences and our oaths, we must decide for the claimants;—but let us beware;—beware of what? Of the opinion which may be entertained by others—by Great Britain or America—of that decision which a Commissioner *must* give, because on deliberation he is satisfied that justice and his duty require it? Certainly not;—what would arbitrators between individuals say, if one of the parties desired them to take care what they did; for if they decided against what *he* thought to be right, he would hold their award to be good for nothing? Surely they would feel themselves insulted; and inform him, that they would certainly do what *they* thought to be right without the smallest regard to *his* opinion on the subject.

“*Officially* Mr. Macdonald has no concern with the question suggested in the answer in Cunningham’s case, how far the two nations will be bound by the awards of the Board?—But privately he thinks it fit to declare, that in his opinion, (and he has reason to believe that every member of the Board agrees with him) nothing can be more completely erroneous than the argument there maintained, and unfortunately exposed to the world in print. Indeed if he had ever imagined there was room for such a question, he certainly would not have consented to accept of the situation of a Commissioner; to be employed in the frivolous occupation of giving judgments, which were to have effect, or not, according to the pleasure of *either* of the parties:—the law he holds to be most clearly this, that unless the deviation from the cases submitted (which are not specially stated but generally defined) is *manifest* (*i. e.*) according to the meaning given to that word by common understanding, as well as by *Vattel* in the very sentence quoted in Cunningham’s case, such as cannot be rendered doubtful by the dissent of the parties, the award is binding on both nations, without the smallest regard to what either of them *singly* may think of it. It is true that a void award might by *possibility* be made by the board, such for instance as an award for confiscated *land*, or on debts contracted *after* the peace, and the like; which would be so *manifestly* out of the treaty, that there could be no “*dissent*” upon the subject—but men of common understanding cannot give a void award under this treaty, without corrupt motives; because the deviation must be *palpable*, and of course intentional.”

May 21, 1798.

*In the Case of the Right Reverend*  
 CHARLES INGLIS (Bishop of Nova  
 Scotia.)

CLAIM for bond debts, the justice of which did not come into question.

OBJECTIONS by the Agent for the United States.

*First.* That the claimant having been attainted by an act of the state of New-York, passed before the peace, on account of his adherence to his Britannic Majesty; and being one of that description of persons who are known under the denomination of *Loyalists* or *Refugees*; he did not possess a character entitling him to claim before the Board.

*Secondly.* That the debts due to him having been *confiscated* by the said act, he was not a creditor within the meaning of the *fourth* article of the treaty of peace; and came only within the recommendatory provisions of the *fifth* article thereof.

*Thirdly.* That he was guilty of manifest negligence, in not having proceeded at law for the recovery of his debt; and was bound still to go through a course of judicial proceedings for that purpose; having a remedy before the Board to the extent only of what should appear, from the result of such proceedings, to be irrecoverably lost.

On full argument, the Board, consisting of all the five Commissioners, *unanimously* decided the first and second points in favour of the claimant; and reserved



the third, for further consideration.—They resolved as follows.”—

“RESOLVED—That the claimant’s character of British subject, was not affected or impaired by the act of attainder and confiscation, passed by the state of New-York on the 21st of October 1779, attainting him, with the Earl of Dunmore, Governor Tryon, Sir Henry Clinton, and many other British subjects, who are therein described, not as subjects of the state, but, as “persons holding or claiming property within the state;” and forfeiting and confiscating their whole estates real and personal for their adherence to his Britannic Majesty: but that on the contrary, the said act of attainder, and the description of Loyalist or Refugee, applied to the claimant on the part of the United States, in consequence of his said adherence, are conclusive evidence, that he still maintained his original allegiance:—that therefore, he is entitled to claim before this Board under the fourth article of the definitive treaty of peace, and the sixth article of the treaty of amity, between his said Majesty and the United States.\*

“RESOLVED—That the confiscation of the debts in question before the peace is no bar to the claim:† and that the board have so determined, upon the same grounds and principles of interpretation, respecting confiscations before the peace, which were adopted and declared by the judges of the United States, when (in the case of *Hamiltons against Eaton*‡) they decided in their circuit court for North Carolina district, that debts due to British subjects who resided in the

\* See opinions of federal judges, since the treaty of amity, appendix, N. IV. 4.

† See appendix, N. IV. 6.

‡ The board were not at this time acquainted with the opinions to the same effect, delivered by the judges of the supreme court of the United States, in the case of *Warre administrator of Jones against Hylton*, and others; also since the treaty of amity.



province, now state of North Carolina, at the date of the Declaration of Independence, and continued there to reside till the 20th day of October 1777, when they were obliged by law, either to take an oath of abjuration and allegiance to the state, or to depart; and which debts had been confiscated or forfeited to the state before the peace, were nevertheless due and owing by virtue of the treaty.

“RESOLVED—That the terms of the said fourth article of the definitive treaty of peace, are in themselves plain, explicit and unambiguous:\* and do not require or admit of any construction or explanation from the fifth article,† to which the fourth article bears no relation whatever.”



July 13, 1798.‖

*In the Case of* STRACHAN *and* MAC-  
KENZIE.

CLAIM complaining of the operation of the following acts of the state of *South Carolina*, commonly called the *Instalment* laws, viz.

An act passed on the 26th day of March 1784, whereby it was enacted, that no “suit or action should  
“be commenced either in equity or at law, for the

\* See opinions of federal judges, app. N. IV. 3.

† Ibid.

‖ This having been only the second instance of an important decision, it is proper to mention, that little of that mass of business which at length came before the Board, had then appeared. It did not come forward to any great extent, till towards the end of the term of *eighteen* months, prescribed by the treaty for receiving complaints.

“ recovery of any debt or bond, note or account, contracted by a citizen of any of the United States previous to the 26th day of February 1782, until the first day of January then next (1785)” after which, it should be lawful to recover only the interest which had accrued since the first day of January 1780, “ on all bonds, notes, or other contracts bearing interest.”—And after the 1st day of January 1786, only such other interest as might be due, and *one fourth* part of the principal sum: and after the 1st day of January 1787, *one other fourth* part of the principal sum with the interest: and after the 1st day of January 1788, *one other fourth* part of the principal sum with the interest: and after the 1st day of January 1789, “ the balance which might then be due and owing:” but providing that if any debtor should, on notice, refuse to give to his creditor such security for the debt as should be approved “ by one of the judges of the court of common-pleas, if in the Charlestown district, and by a Commissioner for taking special bail, “ if in any of the circuit court districts,” the creditor of such debtor should be at liberty to sue and proceed to execution for the debt:—further, that no property mortgaged since the 26th day of February 1782, should be seized, provided the principal and interest of the debt were paid at the periods before mentioned.

And by another act passed on the 28th day of March 1787, it was enacted, that all debts contracted previous to the 1st day of January 1787, should (with certain exceptions) be recovered by *Instalments* only; viz. on the 1st day of March 1788, *one third part* of the principal and interest, and on the 1st day of March 1789, *one moiety* of the principal and interest then due; and on the 1st day of March 1790, the remaining balance of the debt: and that no judgment should bind the property of the debtor to a greater amount; but



that no debtor who should fail to give such security for the debt, in the manner therein mentioned, “ as  
 “ any one or more of the judges of the supreme court;  
 “ any one or more of the justices of the peace of the  
 “ district, not exceeding three; any one or more  
 “ of the justices of the county courts, not exceeding  
 “ three; any one or more of the Commissioners of  
 “ special bail, not exceeding three, respectively; at  
 “ the option of the creditor, should deem sufficient,”  
 should have any benefit under the act.—And the preceding act was thereby repealed.

And by a subsequent act, passed on the 4th day of November 1788, the debts described in the act immediately preceding, were made recoverable only by instalments of one *fifth* part of the principal sum and interest, on the 25th day of March yearly, from the 25th day of March 1789 to the 25th day of March 1792, *inclusive*; and the balance remaining due with the interest thereon, on the 25th day of March 1793:—with a similar provision entitling the creditor to such security, as should be approved in the manner described in the preceding act: and another provision, that  
 “ no sheriff, or other officer, should be authorized to  
 “ sell any real or personal property in virtue of his  
 “ office, at public auction, for *specie* only; but all  
 “ purchasers at such sales, should have the *option* of  
 “ paying, either in *specie*, or the *paper medium*; any  
 “ law to the contrary notwithstanding.”

And all former Instalment laws were thereby repealed.

The claimants founded their demand on a series of accounts, terminating at the end of the year 1774, as extracted from the books of the partnership in London, and proved by the oath of the bookkeeper and one



of the partners; and also by bonds which were produced and proved to the Board.

There was little dispute respecting the existence of the debt claimed; as will appear from the following passage, extracted from the written argument, on the part of the United States: "The Agent for the United States cannot but admit in this particular case, that the books of entry being in Great Britain where the credit was given; and the accounts presented to the Commissioners stating the particular items and dates, being proved by the oath of the bookkeeper, as well as one of the parties, to have been extracted, and truly copied from those books; and bonds being produced, which were delivered, amounting to nearly the whole claim of principal and interest, there is good reason to believe, that nearly the balance mentioned in the memorial, of £16,946 2 8 sterling, was due on the 31st of December, 1774."

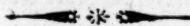
But it was contended, that the loss charged, did not arise from the operation of the above Instalment laws, as lawful impediments to the recovery of the debt; but had been occasioned either wholly, or in part, "by other causes" (as it is expressed in the proviso contained in the article) "which would *equally* have operated to produce such loss; or by the manifest delay or negligence, or wilful omission of the claimant."

On this subject the Board received written evidence and examined witnesses: and, after mature deliberation, the following resolution was this day passed; with the concurrence of all the five Commissioners\*.

\* Colonel Innes of Virginia, one of the American Commissioners, than whom, a man more truly honourable never existed; who enjoyed the cordial friendship of General Washington; had resigned the situation of Attorney General of the state to which he belonged, to

“ RESOLVED, that the laws of South Carolina,  
 “ passed subsequent to the peace, and known under  
 “ the denomination of the *Instalment Laws*, were  
 “ lawful impediments to the recovery of debts secu-  
 “ red by the treaty of peace; and in this case opera-  
 “ ted as such within the meaning of the *sixth* article  
 “ of the treaty of amity.”

A discussion afterwards took place on the subject of the loss charged; founded on averments made by the Agent of the United States, respecting certain subsequent transactions, and other accounts, between the private parties, or their agents.



July 25, 1798.

THE same principle which forbid all official concern, respecting the reception or operation of an opi-

hold a place in the commission; and was distinguished as much for that frankness of mind which disdained all finesse, as for a manly eloquence and correct judgement;—at this time laboured under the indisposition which, in the course of a few weeks, terminated in his death: but his reason was sound; and he had well considered the present question. He declared his opinion, by a letter to Mr. Macdonald, in the following terms. “ Dear Sir—July 11, 1798—Among the distresses  
 “ incident to my present situation, there is no one which I feel more sincerely, than that which proceeds from an apprehension, that my non-  
 “ attendance at our Board, may occasion considerable individual inconvenience, by retarding decisions on the British claims. It is suggested to me by Mr. Grant, that the case of Strachan and Mackenzie  
 “ now stands in the above predicament. Should that be the case, I now  
 “ take the liberty to request that it may not continue so. The prominent features of that case, I have thought, from my first view of it,  
 “ most indisputably brought it within the provision of the treaty; and  
 “ if I were fortunate enough to be able to attend the Board, such would  
 “ be my vote.—With very great esteem and respect, I am, Dear Sir,  
 “ yours, &c. James Innes,”

“ Thomas Macdonald, Esquire.”

The above letter was filed in the office, with the following note upon it, by Mr. Macdonald.—“ 13 July, 1798.—This was delivered to me by Colonel Innes’s son last Wednesday after the Board had risen—  
 “ now communicated by me to the Board.”



nion once maturely formed and conclusively declared, suggested the wish, that all possible aid and information should be previously obtained; and every opportunity of fair and friendly discussion employed. With this view it was, that one of the Commissioners, who had made it a practice to throw out for consideration, such observations as occurred to him, at the moment, on the reading of every paper or argument before the Board, thought of collecting and exposing his observations more distinctly to the view of all the members, as well as of himself, by putting them in writing, and entering them on the minutes, as matter for conference, when no other business (which was frequently the case) happened to be ready at the sittings of the Board. The continued indisposition of Mr. Innes confirmed the suggestion; as the disclosure might be convenient for Mr. Fitzsimons, who had on many points expressed very different sentiments from the other members of the Board; while it could not possibly be attended with any other inconvenience than the trouble of making it.

A minute was accordingly this day entered on the journals of the Board, of which the introduction, for the purpose of shewing its object, and the general exposition of the fourth article of the *treaty of peace*, there submitted as the basis of the whole, need only be stated.

“ Mr. Macdonald laid the following notes before  
 “ the Board, as the substance of what he had occasi-  
 “ onally, with great deference, submitted to their con-  
 “ sideration; and which he wished to have entered in  
 “ the minute book, as such; in order to subject them  
 “ to that close examination which the importance of  
 “ the matter demands, and his desire to be explicit  
 “ and correct, has prompted him to invite.”

“ Under the fourth article of the *treaty of peace*,  
 “ the points of enquiry are these.”



“ *First*. Was the debt *fairly contracted before the peace?*”

“ *Secondly*. Did the whole, or any part of the full value of it, in sterling money, *remain unpaid to the creditor, at the peace?*”

“ If these points are answered in the affirmative, nothing can take the case out of the *treaty of peace*, but the free, voluntary, and uncontrouled discharge of the creditor. A discharge by act or operation of law, unsupported by such free and voluntary act of the creditor, still leaves the debt within the description of *fairly contracted*, and *not fairly paid*: and though such discharge by mere operation of law, would be good against an American creditor, it is of no avail against a British creditor; for this plain reason, that the right of the former is governed by the *general law of the land*, but that of the latter by the *special law of national compact or treaty*.”

“ The article contains no exception either as to the *nature*, or to the *amount* of the debts thereby secured. The words are incapable of any limited interpretation—‘ *all debts*’ of whatever nature—‘ *all debts*’† to their full amount, principal and interest, according to the original contract, or the law and usage *which then prevailed*. This seems to be the necessary exposition.”

“ To the recovery of the full value, in sterling money, of all such debts, *fairly contracted and not fairly paid*, it was agreed, and solemnly promised

† These are almost the very words employed by very learned judges of the United States, whose opinions delivered *since the treaty of amity*, will be found in the appendix. Indeed, the Author of the above notes might in this and many other passages, be accused of plagiarism, if those opinions had been then published. He has certainly felt much gratification in the coincidence.

“ by the two nations, respectively, that British creditors should ‘meet with no lawful impediment’ in America, and American creditors should meet with no lawful impediment, in Great Britain.”

“ The expression ‘*lawful impediment*,’ is as comprehensive, as it is applicable to the subject.”

“ *Every* cause of delay is an *impediment*.”

“ Every cause of delay arising *positively*, out of the *operation* and effect of law; or *negatively*, from *defect* of law, is a *lawful* impediment.”

“ The scope of the article obviously was, that the *law*, or the defect of law, should not, *on either side*, stand between the fair creditor, and his unwilling debtor: that all laws which had been passed against such recovery, should be *repealed*; all necessary means in law *restored*; all bars, by past operation of law, having a *present* effect, *removed*: that the administration of law in the courts of justice, should afford a remedy for the right, *according to the original contract*; which nothing, as already stated, but the free, voluntary, and uncontrouled act of the party himself, should be held to discharge—— In short, that *creditors* who had already borne their share of suffering, under the common calamity of war, with all its train of incidental evils, including the loss of trade and business, as well as the want of their money, should on the return of peace, find their just *rights*, at least, entire; in the state in which they left them; with the same means of making them effectual; and without any obstruction, or cause of delay, *so far as depended on the law*.”

The notes then go on to apply the above exposition of the fourth article of the treaty of *peace*, under the stipulations of the sixth article of the treaty of *amity*,

August 6, 1798.

*In the Case of WILLIAM CUNNINGHAM  
and Company.*

CLAIM, complaining of various lawful impediments in *Virginia*, by which the recovery of the debts in question had been prevented.

OBJECTIONS (*inter alia*) by the Agent for the United States, in a special argument of great length.†—

*First.* That there were “no legal impediments,” to the recovery of British debts, “in *Virginia*, since the peace.”

*Secondly.* That if legal impediments had existed and operated, the claimants were bound to prove, by evidence of the solvency of the debtors, at the period of such operation, that they would have recovered payment, if there had been no such legal impediments to their proceeding for that purpose.

*Thirdly.* That debts described as doubtful, in lists made up in the year 1775, (and which were not alleged to have since become good) ought not to be admitted, as the subject of a claim before the Board.

† This argument was announced to the Board as being drawn up by the Attorney General, in the following letter to the Agent for the United States, annexed to it, and therewith printed. “Attorney General’s office, 2 April, 1798. Sir, The claim of William Cunningham & co. contained so many important principles necessary to be decided by the Commissioners, that in preparing an answer to it, I thought it best to make a thorough investigation of the subject which the treaty has referred to them. The answer you will be pleased to file; and in other claims which embrace any of the matters that have been here discussed, it will be convenient, and save much trouble, to refer in a proper manner, to the arguments which have been urged in this case. I am, &c. Charles Lee.”



On full argument, and evidence, before the Board, and discussion, in it; the Board decided the first and second points (Mr. Fitzsimons dissenting) in favour of the claimants; by resolving, *that there were* lawful impediments in Virginia; to some of which they specially referred: and that to such lawful impediments, all losses incurred through lapse of time, the loss of legal evidence, insolvency of debtors, or otherwise, which arose during the operation of the said lawful impediments, were *prima facie*, to be ascribed:—reserving it to the United States to shew, within the provision of the treaty, that such losses arose from other causes.

The third point was decided, *unanimously*, in favour of the United States.



August 6, 1798.

### *In the Case of* DANIEL DULANY.

CLAIM of a British subject, as residuary legatee, under the will of a testatrix, who died in Maryland, in December, 1775; complaining of the operation, since the peace, of a law of the state of Maryland, passed during the war, whereby the debtor was authorised to *tender*, and the creditor *required to receive*, paper money, in full satisfaction of his debt; which debt was declared to be extinguished in whole, *if such tender was refused*; and if the creditor also refused to give an acquittance, or to deliver up the security, he was liable to a judgment and execution for damages, to the extent of the debt, *with costs*: stating

that by force of this peremptory and penal law, which afforded no reasonable alternative, the executor was obliged to receive payment of debts due to the testatrix in depreciated paper money; which debts it was admitted were thereby extinguished, to the extent of the value in sterling money, of the depreciated paper paid; but to that extent only: and as they were necessarily held, to be *wholly extinguished at law*; so that there could be no recovery by judicial proceedings;—therefore claiming compensation for the loss before the Board.

OBJECTIONS by the Agent for the United States:—that the *executor*, and not the residuary legatee, was the creditor; inasmuch as the executor only, could sue and give acquittances for the debts due to the testatrix: and the executor (now deceased) having been, as it was alledged, an American citizen, the law was binding upon him; and through him, upon the residuary legatee: that besides, the executor had given acquittances, or delivered up the securities pursuant to the law: and that therefore the debts were extinguished by the act of the creditor; and not by operation of law.

After five arguments, of which three, including the last, were on the part of the United States: the Board, or at least three of the four members present,|| considering the executor as merely an agent or trustee; and that the person, having the immediate beneficial interest, was entitled to claim under the treaty: that the act of the executor, *in obedience to a peremptory law*, was not the act of the creditor, but of the law itself: that the fourth article of the treaty of peace provided, that creditors, on either side, should meet with no lawful impediments to the recovery of the *full value in sterling money*, of all *bona fide* debts theretofore contracted: and that the said law, so operating after the

|| This is so stated, in order to avoid taking notice of an occurrence, which in the spirit of this publication, it is better to omit.

peace, and placing the creditor, without his consent, in the situation, that, whether he received the tender, and obeyed the law; or refused, and disobeyed; the debt was thereby immediately extinguished; was a lawful impediment, within the meaning of the treaties;—declared their decided opinion, on those general questions, in favour of the claimant.

At the next sitting however, Mr. Fitzsimons, who had earnestly opposed the opinion of the three other members in favour of the claim: and was enabled so to do, as he stated, by means of the best information and advice; entered a protest on the journals, in which he asserted, that the above opinion of the three other members, was not only unjust, but “*manifestly*” “unjust;” and accordingly, he gave no reasons for the charge.



August 28, 1798.

Mr. Innes having died on the 2d of this month, was succeeded by Mr. *Sitgreaves*; whose commission dated the 11th, was presented this day; when he took the oath and his seat at the Board.



December 4, 1798.

THE BOARD this day, on the motion of one of the British Commissioners, made the following order.

“ The Board considering that many of the memorials and claims now before them, are avowedly de-



“fective in necessary statement and detail; which  
 “defect the claimants pray leave to supply by ad-  
 “ditional memorials; and that the greater part of  
 “all the memorials before the Board contain only *ge-*  
 “*neral* averments, without stating the nature of the  
 “evidence, by which the claimants are ready respec-  
 “tively to substantiate the same.—Ordered, that in all  
 “such cases, the several claimants present additional  
 “memorials without delay; and that, in particular,  
 “without derogating from, but in confirmation of,  
 “former rules and orders made by the Board, on  
 “the subject of evidence, they *therein* set forth the  
 “*precise nature of the evidence*, by which they un-  
 “dertake to support their several averments; whe-  
 “ther the said evidence be matter of record; or  
 “consist of documents in writing; or of proof by  
 “witnesses; referring each several species, or mode  
 “of evidence, by distinct application of the same, to  
 “each of the averments so to be substantiated:—and  
 “that they have such evidence in readiness, to be pro-  
 “duced within a limited time, which the Board will  
 “prescribe, if they see cause to enter upon such evi-  
 “dence, and consider the same as, in its nature, com-  
 “petent and admissible in support of such aver-  
 “ments.”

December 18, 1798.

*In the Case of* WILLIAM CUNNINGHAM  
*and Company.*

CLAIM (before referred to) complaining, *inter*  
*alia*, of the practice of courts and juries, in deduct-  
 ing more than one third of all debts bearing interest;  
 by adopting a *general rule*, of denying interest in eve-

ry case, without regard to the nature or terms of the contract, during the period of the war; and claiming compensation for interest so deducted, accordingly.

OBJECTION by the Attorney General\* and Agent for the United States:—that this judicial practice, or general rule, was just; and that the uniformity of it, through the greater part of all the states in the Union, proved that it was so:—that therefore no compensation was due.

But the Board on full argument resolved (Mr. Fitzsimons and Mr. Sitgreaves dissenting) that the war† could not justify any such *general* rule of deduction; and that interest ought to be awarded, “ according to “ the nature and import, express or implied, of the several contracts.”‡ And to prevent mistakes they afterwards resolved, “ that in deciding against an objection to the payment of interest during the war, maintained *generally*, and without regard to the nature “ and import of the contract, express or implied, they “ did not preclude, but necessarily saved all objections “ to the payment of interest, which may arise out of the “ contract, or other special circumstances of the case.”

THIS, and some other business being finished, the Board unanimously laid down the following general rule, on the subject of evidence.

“ Resolved, that the Board will receive such evidence only, to prove the debts which are the sub-

\* The objection was stated and argued in the above mentioned paper, drawn up by the Attorney General.

† See Judge Paterson's opinion, app. N. IV. 2.

‡ The above resolutions and all others on contested points, give an ample statement and detail of the leading grounds of evidence and reasoning on which they are founded. But the object here, not being to maintain or defend the opinions given; but merely to make them known, their *import* only is in general stated. Those who wish to consider the merits of such cases, must consult the resolutions themselves, and the papers of dissent; most of which have been printed by the parties.



“jects of claim before them, as would have been  
 “competent and admissible to prove the same, imme-  
 “diately previous to the operation of lawful impedi-  
 “ments, in the courts of the states where the debtors  
 “at that time respectively resided; unless upon spe-  
 “cial cause first shewn, and an order of the Board for  
 “the admission of evidence of any other descrip-  
 “tion.”



February 19, 1799.

*In the Case of the Right Reverend*  
 CHARLES INGLIS.—

CLAIM (already referred to) complaining of the act of attainder and confiscation of the state of New York, as a lawful impediment, by which the recovery of certain debts, the justice whereof was not brought into question, had been prevented.

OBJECTIONS by the Agent for the United States, as before set forth (page 5); the first and second of which were decided as there stated; and the third reserved for further consideration.

The Board, after several special arguments, and much discussion, proceeded to decide the question; when the majority declared it to be clearly their opinion, from the evidence before the Board, that at, and before the date of the treaty of amity, the claimant could not have recovered in the ordinary course of justice; and had not therefore been guilty of negligence in



not proceeding for that purpose:—and further, that from the terms of the sixth article, and the inconsistency of the contrary position (as it appeared to them) with the whole meaning and object of that article, the claimant was not *now* obliged to go through a course of judicial proceedings, for the purpose of trying the experiment, whether the courts would decide differently from the decisions, which had been given preceding the treaty of amity: “ by which a  
 “ right to ‘ full and adequate’ compensation from the  
 “ United States vested in those individuals, whose cases  
 “ were then within the description it contained; a  
 “ right not contingent, or fluctuating on future circumstances, but perfect and entire; to be carried  
 “ into effect, not according to the precarious result of  
 “ different experimental proceedings, in their nature  
 “ dilatory, and tending from the costs of litigation,  
 “ and the protraction of dispute, to an increase of the  
 “ evil; but, by one simple and definitive course of remedy, prescribed jointly by the two nations, in the  
 “ spirit of friendship and peace, for the purpose of  
 “ speedily putting an end to the only remaining cause  
 “ of irritation and discontent; and to be exclusively  
 “ administered by arbitrators, whom they have mutually chosen, and invested with ample powers, for  
 “ that wise and amicable purpose.”

To prevent a vote upon this resolution, in which the majority of the Board concurred, Mr. Fitzsimons and Mr. Sitgreaves withdrew; insisting that, notwithstanding the declaration of the treaty, that all decisions should be made by the *majority*; and that “ the award  
 “ of the Commissioners, or of *any three* of them, should,  
 “ *in all cases*, be final and conclusive; both as to the  
 “ justice of the claim, and to the amount of the sum  
 “ to be paid to the creditor or claimant,” they were entitled under the provision, “ that one of the Commissioners on each side, and the fifth Commissioner,  
 “ should be present,” to withhold their presence; or to withdraw and break up the sitting, for the purpose of

preventing the opinion of a majority from being carried into effect.

On the same principle, they again seceded, or withdrew, when the majority concurred in proposing an additional resolution, explanatory of the above; declaring, that the said former resolution "did not affect the case, where there was no satisfactory evidence, that the claimant could not at the date of the treaty of amity, recover a full and adequate compensation, in the ordinary course of judicial proceedings."

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February 20, 1799.

*In the Case of* SAMUEL BRAILSFORD.

IN this case, on the motion of one of the British Commissioners, the Board unanimously passed the following resolution.

"The Board having considered the memorial and claim of Samuel Brailsford, who states, 'that on the 6th day of June, in the year 1794, he became a citizen,' *dismissed* the said claim."

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February 22, 1799.

*In the Case of* JOS. ANDERSON.

CLAIM, complaining of an act of the state of Vermont, passed in 1779, prohibiting the return of



all persons who had joined the British army, on pain of *whipping*; and if they remained one month after, or again returned, *death*; as a lawful impediment, by which he was prevented from recovering his debts.

On the motion of one of the British Commissioners, it was unanimously Ordered, that the General Agent for claimants, by additional memorial, shew cause, why the claim ought not to be dismissed; on the ground, that the act of assembly, stated in the memorial, was no lawful impediment, operating *after the peace*, to the recovery of the debts claimed: and that, no other lawful impediment was therein referred to.

And on the 5th of March, an additional memorial having been accordingly laid before, and considered by the Board, the claim was unanimously *dismissed*.



February 26, 1799.

THE American Commissioners having, in conference, continued their support of the position, which in the case of *Inglis* they had distinctly and formally declared, that, when they could not in any other way prevent a decision, by the majority, against what *they* (the American Commissioners) conceived to be the just rights and interests of the United States, *they* were entitled, and even bound *in duty*, to secede, or withdraw from the Board for that purpose; the three other members, who held a very different opinion, thought they could not place their view of the subject in a clearer light, than that which was presented by the following resolution.—

“RESOLVED, that it is expedient to declare,  
“that the Commissioners appointed by his Britannic



" Majesty, are equally charged with the rights of  
 " the United States under the treaty of amity, as  
 " with those of Great Britain, or of British subjects,  
 " claiming before this Board; and that the Commis-  
 " sioners appointed by the United States, are in like  
 " manner, equally charged with the rights of Great-  
 " Britain, and of British subjects so claiming, as with  
 " those of the United States:—that there is no dis-  
 " tinction whatever of character or duty among the  
 " members of the Board; but that each of the five  
 " members thereof is an arbitrator upon oath, to pro-  
 " ceed diligently, and decide all questions, whether  
 " of interpretation or of fact, with perfect impartiali-  
 " ty; and without any regard to his original appoint-  
 " ment, or the manner in which the opinion he is  
 " bound in conscience to give, may affect the inte-  
 " rest of the parties concerned."

This declaration was proposed by three members  
 of the Board, and so recorded; but Mr. Fitzsimons  
 and Mr. Sitgreaves, thinking it their duty to prevent  
 it from being passed by a vote, again seceded, or with-  
 drew.

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February 27, 1799.

*In the Case of* DANIEL DULANY.

An order, for the purpose of bringing this case to  
 a conclusion, was this day moved as follows.—

" The following Orders of the Board, having, on  
 " the motion of Mr. Macdonald, been read yester-  
 " day, viz. an Order dated the 14th day of Decem-  
 " ber last, in these words, ' that the claimant speci-  
 " ally set forth within eight days, what further  
 " evidence he offers to lay before the Board in sup-

all persons who had joined the British army, on pain of *whipping*; and if they remained one month after, or again returned, *death*; as a lawful impediment, by which he was prevented from recovering his debts.

On the motion of one of the British Commissioners, it was unanimously Ordered, that the General Agent for claimants, by additional memorial, shew cause, why the claim ought not to be dismissed; on the ground, that the act of assembly, stated in the memorial, was no lawful impediment, operating *after the peace*, to the recovery of the debts claimed: and that, no other lawful impediment was therein referred to.

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“ Majesty, are equally charged with the rights of  
 “ the United States under the treaty of amity, as  
 “ with those of Great Britain, or of British subjects,  
 “ claiming before this Board; and that the Commis-  
 “ sioners appointed by the United States, are in like  
 “ manner, equally charged with the rights of Great-  
 “ Britain, and of British subjects so claiming, as with  
 “ those of the United States:—that there is no dis-  
 “ tinction whatever of character or duty among the  
 “ members of the Board; but that each of the five  
 “ members thereof is an arbitrator upon oath, to pro-  
 “ ceed diligently, and decide all questions, whether  
 “ of interpretation or of fact, with perfect impartiali-  
 “ ty; and without any regard to his original appoint-  
 “ ment, or the manner in which the opinion he is  
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February 27, 1799.

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An order, for the purpose of bringing this case to  
 a conclusion, was this day moved as follows.—

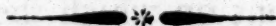
“ The following Orders of the Board, having, on  
 “ the motion of Mr. Macdonald, been read yester-  
 “ day, viz. an Order dated the 14th day of Decem-  
 “ ber last, in these words, ‘ that the claimant speci-  
 “ ally set forth within eight days, what further  
 “ evidence he offers to lay before the Board in sup-



“ ‘ port of his claim:’ an Order dated the 18th day  
 “ of the said month of December, in these words,  
 “ ‘ that the Agent for the United States have leave to  
 “ ‘ see, and make observations, on special averments  
 “ ‘ for evidence’ then laid before the Board by the  
 “ General Agent; and an Order dated the 8th day of  
 “ January last, in these words, ‘ on the application  
 “ ‘ of the General Agent for claimants, to appoint a  
 “ ‘ day for the examination of William Cooke, Esq.  
 “ ‘ having been read; Ordered, that the General  
 “ ‘ Agent for claimants specially set forth, the par-  
 “ ‘ ticular points on which he is adduced as a witness,  
 “ ‘ and that the further consideration of the applica-  
 “ ‘ tion be postponed until to-morrow:’——And  
 “ Mr. Macdonald having then mentioned, that he  
 “ would this day move the Board to proceed in the  
 “ further investigation of fact in this case, consistent-  
 “ ly with the above orders, by authorizing the exa-  
 “ mination of Mr. Cooke at Baltimore, where he re-  
 “ sides, now accordingly moved the following Order.”

“ ORDERED, that the General Agent for claim-  
 “ ants prepare and lay before the Board, interrogato-  
 “ ries in this case to be settled by the Board, for the  
 “ examination of the said William Cooke, at Balti-  
 “ more.”

But Mr. Fitzsimons and Mr. Sitgreaves, thinking  
 it their duty to prevent all investigation in this case,  
 again seceded, or withdrew.



March 26, 1799.

*In the Case of* JOSEPH TAYLOR.

ON the motion of one of the British Commission-  
 ers, the claim in this case was unanimously dismissed,  
 as follows,

“ THE BOARD having resumed the consideration of the claim of Joseph Taylor, with the re-  
 “ presentation and certificate laid before them on the  
 “ part of the United States, from which it appears,  
 “ that the claimant became a citizen in the year 1788,  
 “ having for that purpose, taken the oath ‘ of abju-  
 “ ‘ ration of the King of Great Britain, and the oath  
 “ ‘ of allegiance to the state of New Jersey;’ *dis-*  
 “ *missed* the said claim.”



The same day.

*In the Case of* HANBURY, *and others,*  
*Executors of* MARY HANBURY.

AFTER considerable opposition and argument, Mr. Fitzsimons and Mr. Sitgreaves agreed to concur with the three other members of the Board, in giving an award in this case for the principal sum and full interest; while those three members, on their part, agreed to abstain from passing a resolution which had been prepared, and read in the Board; stating, (on account of the difference of opinion on all the points of the case which had till then been maintained) the grounds and reasons on which they held the claim to be well founded.

The principal sum in question was only £.370 sterling secured by bond; but the case involved the greater part of all the principles which had been contested before the Board. And the unanimous concurrence in the opinion, that the claimants were entitled to an award, was necessarily to be considered, as a declara-



tion by unanimous opinion, that such of the objections which had been stated, or arose from the facts of the case, as would, if they had been well founded, have interposed an insurmountable bar to an award within the meaning of the treaty, were *not* well founded; and that the case *was* within the meaning of the treaty.

The debt, as being due to a British subject, had been paid by the debtor into the state Treasury of Maryland, under the benefit of an act of Assembly passed in the year 1780; whereby it was enacted, “ that all debts, promises, contracts, covenants and “ agreements, *thereafter* made, by writing or parole, “ for gold or silver, or paper money, should be paid, “ discharged, or executed, *agreeable to* the bond, &c. “ or the parole promise or agreement, *and the intent “ and meaning of the parties*; any law *to the contrary “ thereof*, notwithstanding.”—“ and it was also thereby “ enacted, that the bills of credit issued by Congress, “ or emitted by any acts of Assembly under the old “ government, or resolves of Convention, should not, “ after the passing of the said act, be a tender or pay- “ ment in law or equity, for any debt, &c. created or “ made before the first day of September, 1776; *un- “ less where the creditor had not become a subject “ and resident of this or some one of the United States, “ since the said first day of September, 1776; and in such “ case* the debtor of such creditor, or of his assignee “ (who had not become a subject, and resident of this “ or some one of the United States, and who had not, “ had an attorney in fact, acknowledging himself as “ such, for the purpose of receiving debts, always “ since that time, and constantly residing within the “ said state, since the 1st day of September, 1776) “ might, on making oath or affirmation,” to the ef- “ fect therein mentioned, pay to either of the Treasurers “ of the state, to the amount prescribed by the act, ac- “ cording to the circumstances required to be set forth “ in the oath or affirmation, “ *in discharge of the debt*



“ *due to such creditor,*” in the bills of credit therein described : and that “ such payment should be deemed in law *a payment of such creditor*, or his assignee ; “ and the Treasurers’ receipt *should be good evidence in the courts of law and equity*, of the payment of “ such debt.”

The debt in question was not within any of the descriptions to be saved by this act. Having been contracted before the passing of the act, it was by the converse of the first clause, *not* to be “ discharged according to the bond, promise or agreement, or “ *the intent and meaning of the parties:*” And being due to persons who had *not* become “ subjects, or “ residents, of any of the United States, and who “ could not” therefore, derive even a remote benefit from a payment of their money into the state treasury, it was made liable to be discharged by such payment.

But the creditor, Mary Hanbury, a British subject, relying on the fourth article of the treaty of peace, brought her action in August, 1786, notwithstanding the above payment and legal extinction, against the debtor Stephen West, in the general court of Maryland ; where judgment was given, according to a judicial agreement, by memorandum on the record, in the following terms.—“ Judgment was rendered in “ this cause on the 14th day of November, 1787, for “ the value of the bond, in current money and costs of “ suit, subject, nevertheless, to the following terms, “ viz. The plaintiff agrees to release this judgment, in “ case *the courts of law of this state* shall finally de- “ termine, that payments into the Treasury, agreea- “ bly to the act of October, 1780, c. 5, entitled, “ An act for calling out of circulation the bills of “ credit, &c. is good in law—The Plaintiff agrees to “ release the *interest* due on the bond *during the war*, “ between the 4th day of July, 1776, and the “ day of 1783, the date of the definitive “ treaty, in case the courts of law of this state shall

“ finally determine, that interest on bonds to British subjects during the war, or any part of the said time, cannot be recovered by them.”

The general court of the state decided in favour of the *British creditor*, on the above question of payments into the state treasury, with deduction of interest during the war; but the *high court of appeals* of the state, decided the question uniformly *against* the British creditor.

The above question, on payments into the state treasury, had in particular been so decided against the British creditor, by the said high court of appeals of the state, on the 9th day of June, 1795, in the case of *Harwood* against *Clark administrator of Russel*; notwithstanding the fourth article of the treaty of peace, and a special act of assembly of the state, dated the 14th day of May, 1787, in the following strong terms: “ Be it enacted, &c. &c. and it is declared, that the treaty of peace, made between the United States of America and his Britannic Majesty, *is the supreme law within the state*; and shall be so considered, and adjudged, *in all courts of law and equity*; and all causes and questions, cognizable by the said courts, respectively, ought, and *shall* be, determined according to the said treaty, and the tenor, true intent, and meaning thereof:” —and also, notwithstanding the establishment of the federal constitution, which was adopted by the state of Maryland, on the 28th day of April, 1788; the sixth article of which contains in terms not less absolute, the following declaration, viz; “ This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land*; and the judges *in every state*, shall be bound thereby; any thing in the constitution, or laws of any state, to the contrary, notwithstanding.”



And the precise same question, on payments into the loan office of *Virginia*, had, in the year 1793, been determined against the British creditor, in the case of *Hylton and others* against *Jones*; not by a *state* court, but by federal judges in a *federal* court, under the new constitution; namely, the Circuit court† of the United States;—also, notwithstanding the fourth article of the treaty of peace, and the sixth article of the federal constitution, before recited.

Nor was it till February 1796, after the conclusion of the treaty of amity, that the law was declared to be the reverse of what it had, by federal as well as state judges, been declared to be, before that treaty; by the reversal in the supreme court of the United States, of the decision which had been given by the circuit court, in the above mentioned case, of *Hylton and others* against *Jones*: in consequence of which reversal in the supreme court,\* the decision of the high court of appeals of the state of Maryland, in the case of *Harwood* against *Clark*, was also there reversed.

Such had been the course, and was the state of the law, when the claim in this case was laid before the Board. It was the first case which stood ripe for determination in the Board, on the question arising from such payments of British debts into state treasuries; and it disclosed the following points of importance.—

The impediment complained of was a *plea*; put in after the peace, on a legislative act, which at the time when the claim was presented, under the treaty of amity, was settled by a decision in the last resort,

† The Circuit Court of the United States is not a Court of *Nisi Prius*, but a court of high original, as well as appellate jurisdiction; and next in rank to the *Supreme* Court of the Union.

\* The case of the British creditors, plaintiffs in error, was argued by *E. Tilghman*; and that of the defendants by *Marshall* of Virginia, 3 Dallas's Reports 199.



to have been virtually repealed by the treaty of peace; the contrary having been held to be the law, at the date of the treaty of amity.

The impediment operated by means of *the act* of *the creditor* who released the judgment; and not by operation of law, without the intervention of any act of the creditor; such act however, being a reasonable act, to which the uncertain state of the law, for want of a special repeal, gave rise.

The case was capable, (as Mr. Sitgreaves, who was particularly conversant in the judicial proceedings of the courts, maintained) of being put in a train, notwithstanding the judgment and release thereof by the creditor, such as would still enable the claimants to avail themselves of the decision, which, since the treaty of amity, had on the same question, been given by the supreme court of the United States, in favour of British creditors, by means of judicial proceedings, which might *now* be instituted for that purpose.

Further, it presented the case of the *inferior* court (the general court of Maryland) deciding in favour of the British creditor, on the treaty of peace; and the *superior* court (the high court of appeals) deciding *against* the British creditor, on the same question.

And lastly, it exhibited *actual* decisions against the acknowledged import, as now settled, of the fourth article of the treaty of peace, both by a *federal* and a high state court, several years *after the adoption of the new constitution, and the establishment of the federal judiciary*; contrasted with the *theory*, that, every breach or disregard of the fourth article of the treaty of peace, as now settled, became impossible *as soon* as the new constitution and federal judiciary was established; because by that new constitution, treaties

were declared to be the law of the land ; and the federal judiciary were bound to adhere to the federal constitution.

The Board having unanimously agreed, as already stated, that an award should be given in favour of the claimants, and of course that the case was within the description of the treaty, an order was made on the General Agent for claimants, to make up an account of the debt ; and on the Agent for the United States, to prepare the draft of such an *assignment* of the debt, as he would propose to have executed in their favour.

The Attorney General having, however, thought it his duty to instruct the Agent for the United States not to comply with the order ; insisting, that he was not *bound* to make such drafts ; the Board, who had made that arrangement on the principle that the Agent of the party, for whose benefit a deed was to be executed, should prepare the draft ; and for the purpose also of preventing little controversies, or objections, which might otherwise be stated to any draft that could be proposed, were afterwards induced, (though against their opinion of propriety) to order the General Agent for claimants to make the draft.—A draft was accordingly made by him ;—it was objected to by the Agent for the United States ;—the award was thereby delayed ; and while the whole Board still concurred in the opinion, that the claimants should have an award, none in fact was ever given.

The opinion of the Board, on the points which the case involved, was, however, as much declared by their agreeing that an award should be given,\* as if it had actually taken place.

\* It need hardly be mentioned, that no power of *compromise*, or in matters essential, of express concurrence without approbation, is given to the Commissioners. Each of them is bound by his oath to decide for or against a claim, according to the best of his judgment, on its merits.



to have been virtually repealed by the treaty of peace; the contrary having been held to be the law, at the date of the treaty of amity.

The impediment operated by means of *the act* of *the creditor* who released the judgment; and not by operation of law, without the intervention of any act of the creditor; such act however, being a reasonable act, to which the uncertain state of the law, for want of a special repeal, gave rise.

The case was capable, (as Mr. Sirgreaves, who was particularly conversant in the judicial proceedings of the courts, maintained) of being put in a train, notwithstanding the judgment and release thereof by the creditor, such as would still enable the claimants to avail themselves of the decision, which, since the treaty of amity, had on the same question, been given by the supreme court of the United States, in favour of British creditors, by means of judicial proceedings, which might *now* be instituted for that purpose.

Further, it presented the case of the *inferior* court (the general court of Maryland) deciding in favour of the British creditor, on the treaty of peace; and the *superior* court (the high court of appeals) deciding *against* the British creditor, on the same question.

And lastly, it exhibited *actual* decisions against the acknowledged import, as now settled, of the fourth article of the treaty of peace, both by a *federal* and a high state court, several years *after the adoption of the new constitution, and the establishment of the federal judiciary*; contrasted with the *theory*, that, every breach or disregard of the fourth article of the treaty of peace, as now settled, became impossible *as soon* as the new constitution and federal judiciary was established; because by that new constitution, treaties



were declared to be the law of the land ; and the federal judiciary were bound to adhere to the federal constitution.

The Board having unanimously agreed, as already stated, that an award should be given in favour of the claimants, and of course that the case was within the description of the treaty, an order was made on the General Agent for claimants, to make up an account of the debt ; and on the Agent for the United States, to prepare the draft of such an *assignment* of the debt, as he would propose to have executed in their favour.

The Attorney General having, however, thought it his duty to instruct the Agent for the United States not to comply with the order ; insisting, that he was not *bound* to make such drafts ; the Board, who had made that arrangement on the principle that the Agent of the party, for whose benefit a deed was to be executed, should prepare the draft ; and for the purpose also of preventing little controversies, or objections, which might otherwise be stated to any draft that could be proposed, were afterwards induced, (though against their opinion of propriety) to order the General Agent for claimants to make the draft.—A draft was accordingly made by him ;—it was objected to by the Agent for the United States ;—the award was thereby delayed ; and while the whole Board still concurred in the opinion, that the claimants should have an award, none in fact was ever given.

The opinion of the Board, on the points which the case involved, was, however, as much declared by their agreeing that an award should be given,\* as if it had actually taken place.

\* It need hardly be mentioned, that no power of *compromise*, or in matters essential, of express concurrence without approbation, is given to the Commissioners. Each of them is bound by his oath to decide for or against a claim, according to the best of his judgment, on its merits.

April 19, 1799.

*In the Case of* SAMUEL KERR.

ON the motion of one of the British Commissioners, the claim in this case was unanimously *dismissed*; on the ground that the claimant, and the other surviving partners of Kerr, Mitchel, & co. in behalf of whom he claimed, had according to his own admission, *become citizens* of the United States.



April 24, 1799.

*On the Petition of* JOSEPH CUNLIFFE.

IN the exercise of the discretion given by the treaty,† the Board, on the motion of one of the British Commissioners, made the following Orders.

“ The Board having considered the petition of Joseph Cunliffe, and that no reason is stated why his claim was not presented within the eighteen months prescribed by the treaty;—dismissed the said claim.

† A term of *eighteen* months from the first constitution of the Board, was assigned by the article for receiving complaints and applications; but the Commissioners were “ nevertheless authorized in any particular cases, in which it should appear to them to be reasonable and just, “ to extend the said term of eighteen months for any term not exceeding *six months*, after the expiration thereof.”

*On the Petition of AQUILA GILES and  
ELIZA his Wife.*

“ ORDERED, that the General Agent for claimants set forth, *at what time* the petitioners did consult counsel, as stated in the petition; whether they were advised, that they could not *present* their claim to this Board till letters of administration were obtained; *when* they applied for the said letters of administration; when they were obtained; and when the memorial, stated to have been sent to the General Agent, was so sent.”



May 7, 1799.

*On the last mentioned Petition.*

THE two following cases were this day dismissed on the motion of one of the British Commissioners.

“ THE BOARD having considered the petition of Aquila Giles and Eliza his wife, were of opinion, that no sufficient reason was given why the claim was not presented within the eighteen months prescribed by the treaty; and therefore *dismissed* said petition.”

*On the Petition of ROBERT WATTS.*

“ THE BOARD having considered the petition of Robert Watts, were of opinion, that no sufficient



reason was given why the said claim was not presented within the eighteen months prescribed by the treaty; and therefore *dismissed* the said petition."



May 17, 1799.

*In the Case of* WILLIAM R. LIDDERDALE.

CLAIM, complaining of an act of the state of Virginia, passed in 1777, authorising payment of debts, due from *citizens of the state* to *subjects of Great Britain*, into the *Loan Office* of the state; and which payment, was thereby declared to be a discharge of the debt; the said act having been adjudged, in a case precisely similar, in which the action was instituted on the establishment of the federal judiciary, and brought to a decision in the Circuit Court of the United States, in the year 1793,\* to be in force, as a bar to British creditors, notwithstanding the fourth article of the treaty of peace, and that during the operation of the said act, as a lawful impediment to the recovery of all such debts, viz. in the year 1795, the debtor (Randolph) died; after having settled his property, to a great amount, upon his family.

OBJECTION by the Agent for the United States;—that, as payment into the Loan office under the said act was, in the year 1796, declared by the Supreme Court, *not* to be a discharge of the debt, or bar to the creditor, it was *in law* to be considered, as *never* having been so;—and that, besides, the claimant was bound to institute proceedings in Equity, for the purpose of setting aside, as fraudulent, the

\* See the Case of Hanbury, *supra*.

conveyances of property made by the debtor after the treaty of amity, and during the dependance of the said question in the Supreme Court.

THE BOARD resolved, (Mr. Fitzsimons and Mr. Sitgreaves dissenting) that the recovery of the debt in question, so paid into the Loan office of the state, *was* impeded by the operation of the said act, which, having never been removed by a repeal, was pleaded in the courts, and solemnly adjudged in the year 1793, by a court of federal jurisdiction, to be a bar to the British creditor, notwithstanding the treaty of peace;—and that, although the claimant were *now* bound to go through the *ordinary* course of judicial proceedings, for the recovery of the debt in question, it would not be incumbent on him, to institute proceedings, for the purpose of setting aside *fraudulent* conveyances; such proceedings for the detection and discovery of fraud, not being in the *ordinary* course of judicial proceedings for the recovery of debt, within the meaning of the article.—Reserving all other points in the case; and the full effect of all facts, and circumstances, to shew, that the loss complained of was occasioned by the insolvency of the debtor, or other causes, which would equally have so operated, if no such lawful impediments had existed; or by the omission, or negligence, of the claimant, within the proviso of the article.



May 22, 1799.

*In the Case of* CLARK, *Administrator of*  
RUSSELL, *on the Debt of* J. DORSEY.

CLAIM, complaining of the act of the state of Maryland, passed in the year 1780, authorizing pay-

ments into the treasury of the state, in discharge of debts due to persons who were not " subjects, and " residents of some one of the United States," similar to the Loan office payments, in Virginia; part of the debt in question having been so paid into the treasury of the state, and a case exactly similar (the case of *Harwood* against *Clark* administrator of *Russel* before mentioned) decided against the claimant in the highest court of the state, in the year 1795; where it was held, that the said act of 1780, remained in force against British creditors, notwithstanding the fourth article of the treaty of peace, and that payment under it, into the treasury, was a discharge of the debt.

OBJECTION by the Agent for the United States, the same as in the preceding case:—and that the claim was not at any rate good beyond the sum actually paid into the treasury.

THE BOARD resolved, that the said act *was* a lawful impediment within the meaning of the treaty: *reserving* the question, whether it operated beyond that part of the debt which was paid into the treasury; and also reserving, the full effect of all facts and circumstances to shew, that the loss complained of was occasioned by other causes, as in the preceding case.

N. B. The debtor had been discharged as an insolvent debtor in the year, 1788.



June 21, 1799.

*In the Case of J. BOWMAN and others.*

CLAIM, on account of alledged lawful impediments, for debts which had been sued for at law.



OBJECTION by the Agent for the United States;  
 “ that suits should still be brought, as well for ascer-  
 “ taining the amount, as to prove, that the payment  
 “ is not attainable from the debtor; or to excuse the  
 “ claimants, for the neglect of not making personal  
 “ application for the debts.”

THE BOARD resolved (Mr. Fitzsimons and Mr. Sitgreaves dissenting) “ that it is not *incumbent*\* on  
 “ claimants *now* to bring actions, or institute suits,  
 “ or in any other manner to proceed against the debt-

\* The Board did not here intimate an opinion, that claimants had not a discretion, or ought not now to go to law in any case, within the meaning of the treaty : but merely, that they were not *bound* so to do ; the treaty having given a remedy by *arbitration*, in all cases within the description it contained :—But as something upon this subject, appears, with other general matter, in a memorandum (taken down at the time) of a communication made, on one occasion, to a considerable number of the merchants of Glasgow ; and at other times, to different individuals in London, who were concerned in the commission ; by one of the British Commissioners, soon after he had accepted of the office, it cannot be improper here, to give the following extract from that memorandum ; the substance of which will, no doubt, be remembered by many of those to whom it was addressed.

“ Knowing, as I did, the fair and honourable views of His Majesty’s ministers ; and that nothing was farther from their intention, “ or wish, than that the execution of the article should go beyond the “ recovery of what was *justly* due to British subjects, who had been “ truly aggrieved within its meaning ; I expressed my hope, that I “ should not have the mortification of hearing complaints, or receiving claims, which could not be supported on grounds of sound justice ; and by such evidence as, an honest jury, making allowance “ for all circumstances, would hold to be sufficient. I therefore earnestly recommended it to their care, to instruct their Agents in “ America, in bringing forward and prosecuting claims, to maintain “ a fair, open, and candid course of practice ; becoming the credit and character of those by whom they were employed, and the “ expectations of a Board who sat to relieve against wrongs, within “ the description of the article ; and strictly to guard against its perversion or abuse. This, they assured me, coincided entirely with “ their own impressions, and the instructions they had already given, “ and would still repeat.

“ Having, among other questions, been asked, whether it was expedient, or in any case necessary, *now* to proceed *at law*, I answered, that I could not anticipate the opinion of a Board not yet “ formed ; or hazard any other general observation than this, that, “ whether they were *bound* or not, *now* to proceed at law, they would “ be obliged to shew good cause, why they had not, in every case “ *before* proceeded ; and that such proceedings now, would never “ deprive them, in any case, of a remedy before the Board : but “ that, on the contrary, every well meant measure to lessen the da-

“ or, or his estate, for the recovery of the debts on  
 “ which compensation is claimed, or any part of  
 “ them;—without prejudice to the question, whe-  
 “ ther the claimants ought *before* to have so procee-  
 “ ded; or whether, the loss complained of, or any part  
 “ of it, has been occasioned by the manifest negli-  
 “ gence, or wilful omission, of the claimants, with-  
 “ in the intent and meaning of the proviso in the  
 “ treaty of amity.”



June 26, 1799.

*In the Case of* GEORGE ANDERSON.

CLAIM for debts, due from Robert Hart and John Marshall, of Virginia, the recovery of which was alledged to have been prevented, by the lawful impediments before referred to.—

OBJECTION (*inter alia*) “ that Robert Hart  
 “ was insolvent at the peace, and his estate unequal

“ mage, would be meritorious;—all *irrational* proceedings however,  
 “ such as no prudent man would resort to in his own affairs, necessari-  
 “ ly creating expence, without a reasonable prospect of success, were  
 “ to be avoided; as the additional loss thereby occasioned, never  
 “ could be the ground of a claim for compensation.

“ I added, that the Board would no doubt take occasion, as early as  
 “ possible, to declare their opinions on such *general* questions, as  
 “ should arise out of the cases before them; and it would therefore  
 “ be extremely material for the parties, that claims should be pre-  
 “ sented without delay; even though the evidence were not ready;—  
 “ for many leading points might be determined, on the statements  
 “ contained in the claims themselves.

“ I communicated the same general suggestions in all my occasional  
 “ conversations at London, with persons interested under the com-  
 “ mission.”



“ then, and since the peace, to the payment of his  
 “ debts;” but that, “ until testimony was offered by  
 “ the claimant, to *shew the solvency* of Robert Hart  
 “ at the peace,” it would be premature in the Agent  
 for the United States, to offer evidence of his insol-  
 vency.

THE BOARD finding that the proceedings in  
 the case would thus be suspended, on the question of  
*onus probandi*, which they had before settled by the  
 resolution of the 6th August 1798, in the case of Wil-  
 liam Cunningham and Company, referred to that  
 resolution, and resolved, (Mr. Fitzsimons and Mr.  
 Sitgreaves dissenting) that whatever, in law, “ or the  
 “ settled course of judicial practice, prevented the  
 “ claimant from *proceeding* for the recovery of his  
 “ debt, was to be deemed a lawful impediment which  
 “ prevented such recovery; consequently, the loss  
 “ arising from his not recovering, was, in the *first*  
 “ instance, to be ascribed to the operation of the said  
 “ lawful impediment;—so that it was not incumbent  
 “ on the claimant, to prove the solvency, or capaci-  
 “ ty of the debtor, to satisfy the creditor at, or since  
 “ the peace; but open to the United States, to meet  
 “ the *prima facie* evidence, already stated, by reason-  
 “ able evidence to the contrary.”

And to prevent misapprehension, they thought it  
 expedient to express themselves on this occasion, as  
 follows;—“ And although the Board are to be deter-  
 “ mined by principles of sound reason and justice,  
 “ and not to be affected by suggestions of hardship  
 “ or difficulty, yet desirous as they are, in this great  
 “ national business, to discharge their duty in a man-  
 “ ner, which may be as generally satisfactory as the  
 “ natural prejudices of parties interested will permit,  
 “ they think it not improper, in consideration of the  
 “ earnest opposition which was made in the Board to  
 “ the above recited resolution, in the case of Cun-



“ ningham and company, on the ground, that it ne-  
 “ ver could have been intended, to impose so great  
 “ a *hardship* on the United States; to suggest the  
 “ reflection, that it cannot prove a task of greater  
 “ difficulty to the United States, with all the means  
 “ of enquiry, and information, which they possess,  
 “ and under their responsibility of indemnifying against  
 “ lawful impediments to the recovery of just debts;  
 “ to satisfy this Board, on sufficient evidence, of what  
 “ must, in many instances, have been and may still  
 “ be, matter of great notoriety, viz. that at a certain  
 “ period, a debtor was in such a situation, *that, ac-*  
 “ *cording to reasonable inference*, he could not have  
 “ raised money, or procured security, for the pay-  
 “ ment of a certain debt; although the full force of  
 “ legal execution, had been brought against him;  
 “ than it would be to a *foreign* creditor, perhaps the  
 “ representative only of him who made the contract,  
 “ and totally unacquainted with the former situation  
 “ of the debtor, to bring evidence of the reverse;—  
 “ the facts and circumstances necessary to establish  
 “ the latter proposition, being in their nature, at least  
 “ as much affected by the long lapse of time since the  
 “ peace, when every lawful impediment, to the full  
 “ recovery of the debts in question, ought to have  
 “ been removed, as those, by which the former may  
 “ be substantiated; and such lapse of time, so im-  
 “ pairing the means of evidence, being the just cause  
 “ of complaint, not to the United States, but to  
 “ *creditors only*, wherever the delay appears to  
 “ have arisen, from the operation of lawful impedi-  
 “ ments to the full recovery of debts, fairly contract-  
 “ ed before the peace, and protected against such im-  
 “ pediments by the fourth article of the definitive  
 “ treaty.”

June 26, 1799.

*In the Case of* ANDREW ALLEN.

THE following resolution was, on the motion of one of the British Commissioners, this day unanimously passed.

“ The Board taking into their consideration, the following passage in the observations on the reply, viz. ‘ In the case of Doctor *Inglis*, the Board on ‘ the 21st of May, 1798, resolved, ‘ that the claim- ‘ ant’s character of British subject, was not affected, ‘ or impaired, by the act of *attainder and confiscation*, ‘ passed by the State of New York, on the 21st of Oc- ‘ tober, 1779, attainting him, the Earl of Dunmore, ‘ Governor Tryon, Sir Henry Clinton, and many ‘ other British subjects, who are therein described, ‘ *not as subjects of the state*, but as persons holding ‘ or claiming property within the state; and for- ‘ feiting and confiscating their whole estates real and ‘ personal, for their adherence to his Britannic ‘ Majesty; but that on the contrary, the said act of ‘ attainder, and the description of Loyalist or Re- ‘ fugee, applied to the claimant on the part of the ‘ United States in consequence of his said adhe- ‘ rence, are conclusive evidence, that he still main- ‘ tained his original allegiance: that therefore, he ‘ is entitled to claim before this Board, under the ‘ *fourth* article of the definitive treaty of peace, ‘ and the *sixth* article of the treaty of amity, be- ‘ tween His said Majesty and the United States.’ ‘ This resolution has been exactly recited, because ‘ it may be understood to have omitted the case of ‘ the claimant, who, in the act of attainder and for- ‘ feiture, is expressly described as a subject of the ‘ State of Pennsylvania, and punished as such, by a for- ‘ feiture of his estates and debts. Indeed, the expres- ‘ sions in this resolution seem to imply, that if Doctor

‘ *Inglis* had been attainted as a subject of New York, and his debts confiscated for a crime committed by him as a subject, the Board would have dismissed his claim. The distinction so explicitly taken by the Board, between attainting and punishing a man as a subject, and attainting and punishing him ‘ as a person holding or claiming property within the State,’ must have been meant for some use. At all events, this resolution cannot be considered, as deciding, that the *fourth* article of the treaty of peace set aside legislative acts of attainder and forfeiture, passed against individuals described and holden as subjects of the state, and punishing them for their criminal conduct. There is certainly a difference, between a confiscation of an enemy’s property by the right of war, and, a forfeiture of a subject’s property by law for criminal conduct.’

“ RESOLVED—That in the abovementioned resolution in the case of Dr. *Inglis*, the Board did not decide on the distinction, stated in the above passage to be “ between attainting and punishing a man as a subject, or attainting and punishing him as a person holding or claiming property within the state;” having only referred to the fact for the purpose of shewing, that the case stood clear of all objection on the ground of that alledged distinction.”



July 9, 1799.

*In the same Case.*

CLAIM, for losses, arising from the non recovery of debts due to the claimant, being a subject of His Britannic Majesty, through the operation of an



act of attainder and confiscation, passed against him *as a subject of Pennsylvania*, by "the representatives of the freemen of the Commonwealth of Pennsylvania," on the 6th day of March, 1778; for the crime of *high treason*, in having, "contrary to the allegiance which he owed to the said state, joined and adhered to the army of the King of Great Britain," the said act of attainder and confiscation being a lawful impediment, which operated against the fourth article of the treaty of peace, and within the meaning of the sixth article of the treaty of amity.

OBJECTION, stated on the part of the United States, as "*the first ground of defence*" before the Board;—that, as the claimant was an inhabitant of the state of Pennsylvania at the date of the declaration of Independence, he was *a subject of that state*; for that, "in fact, the United States were independent so early as 1775, and, on the ever glorious and memorable 4th of July, 1776, they solemnly and formally, declared to the world, that they were independent:"—"that the formal acknowledgment of his Britannic Majesty, added nothing to their real Independence, and if the treaty of peace had never been made, the United States would have actually continued an independent nation, though at war with Great Britain to this moment."—And that, "though Andrew Allen, after *being a subject of Pennsylvania*, joined the British forces in December, 1776, and returned to his natural allegiance, this did not dissolve the right of Pennsylvania to *hold him as a subject*, and as its subject to punish him;"—concluding, that he was not entitled to the benefit of the fourth article of the treaty of peace, or sixth article of the treaty of amity.

THE BOARD finding that the objection, *in limine*, thus taken and argued before them, precluded all further investigation, took up the question, so far

only, as it was necessary to the determination of the claimants' national character, and right, to claim—And, after full argument and discussion, and with reference to opinions which had been solemnly delivered by the Judges of the United States, a majority of the Board proposed a resolution, stating, among other things, that “the only difference between the question in this case, and that which is stated in the preceding resolution, consisted in the different words of description, contained in the two several acts: but “as the act of the state of *Pennsylvania*, could not have “any greater effect or operation against the fourth article of the treaty of peace, than that of *New York*; “and as the fact charged to be a crime, viz. adherence “to the cause of His Britannic Majesty, was the same “in both cases, the mere *words* of description, assumed in the act of *Pennsylvania*, could not prove against the character of the party as a British subject; or give efficacy to itself, so as to take the “case out of the meaning and operation of the said “article;”—that at the peace, there was no unconditional submission on the part of Great Britain, “to all “*that had been done*” under the independence of the United States, and the authority they had exercised; but, “a recognition by solemn treaty, containing reciprocal stipulations, as the price of peace, and “for the mutual benefit of both countries;” by the fourth article whereof, in favour “of creditors on either side,” it was expressly, or in effect, stipulated, “that, no act which had been, or should thereafter be “done, or passed, by, or under the authority of the said “United States, or any of them, whatever might be its “form or import; whatever the terms therein employed; “whatever the extent of power thereby assumed; or declared; whatever the character *thereby* ascribed to the “individual against whom it was directed; should be “suffered to operate as a lawful impediment to the recovery of debts, ‘theretofore contracted,’ to a creditor *on the side* of his Britannic Majesty, at the date of



“ the said treaty ”—concluding also in these words—  
 “ that if the claimant could be said, to have at any time  
 “ ‘ *made his election* ’ in favour of the United States,  
 “ under the declaration of Independence; and so de-  
 “ parted for a time, subsequent to that event, from  
 “ his native allegiance (the contrary of which appears  
 “ to have been the case) his return to, and having  
 “ been *on the side* of his said native allegiance *at the*  
 “ *peace*, would have secured to him, the benefit of  
 “ the said fourth article of the treaty:—that accord-  
 “ ingly, having been *on the side* of his Britannic  
 “ Majesty at the date of the treaty of peace, and be-  
 “ ing a natural born subject of his said Majesty, not  
 “ barred by the acceptance of citizenship, from  
 “ the right of complaining against the United States,  
 “ the claimant is entitled, under the treaty of amity,  
 “ to complain to this Board, of the said act of attain-  
 “ der and confiscation before recited, as being a *law-*  
 “ *ful impediment* within the description of the fourth  
 “ article of the treaty of peace, and the sixth article  
 “ of the treaty of amity, to the recovery of such  
 “ debts as he shall prove, to the satisfaction of the  
 “ Board, within the meaning of the said treaties.”

And as the ground which had been taken on the  
 part of the United States involved a subject of deli-  
 cacy, on which they were desirous not to give offence,  
 or be misunderstood, they added, that “ the said  
 “ principles, and conclusions, contained nothing in-  
 “ consistent with that perfect respect, which is due  
 “ to the Independence of the United States; as the  
 “ same was recognized on the part of His Britan-  
 “ nic Majesty, by the first article of the treaty of  
 “ peace.”

To prevent a vote upon this resolution, Mr. Fitz-  
 simons and Mr. Sitgreaves withdrew.



July 17, 1799.

*In the Case of* ROBERT WILLIAMS.

THE following order was in this case moved by one of the British Commissioners.

“ ORDERED, that the General Agent for claimants have leave, by additional argument, to shew cause, why the claim in this case should not be dismissed, on the ground (without prejudice to all other points in the case) that in equity and good faith, this claimant cannot be permitted to complain of loss arising from the acts of a state, to which as such, he admits, that in or about the year 1779, he declared himself to be subject by the solemn engagement of an oath of allegiance, which it is not *for him* to represent as invalid; such oath of allegiance not appearing from any thing before the Board, to have been extorted by duress, or induced by other means or circumstances, than those which arose from the general state of things at the time, and affected other persons in the same situation, who nevertheless refrained from taking such oath—the said additional argument, to be laid before the Board within eight days.”



THERE were other opinions which a majority of the Board had often occasion to declare; such as did not specially rise out of any particular case; but were essential to the execution of the article; and may therefore be here in like manner concisely stated.

They held, that those acts of secession, which had been practised in particular cases, could not affect the validity or operation of the opinions which they were meant to defeat: for the very act of secession implied, what had indeed been formally minuted, that those opinions were the opinions of the majority, which had been declared in a Board, completely constituted: and all that the subsequent secession of some of the members, could effect, was but to prevent, what the treaty did not require, namely, the declaration of opinions, by the *formality of a vote*: that formality being the accustomed, but not the exclusive, *mode* of ascertaining the fact; which, if prevented by an evasive proceeding, might be supplied by the admission, or other evidence, that such had been the fact. They therefore held, that the opinions which had been declared, by a majority of the Board, were as much the opinions *of the Board*, under the express provisions of the article, as if the form of a vote had not been so prevented.

They considered it as clear, that there was no room for *explanation*, when a majority of the Board had *no doubt*: that every such explanation, would be an *alteration* of the treaty, which they had sworn to execute, *as it stood*—that therefore, as soon as the Commissioners had formed an opinion, they had no choice of proceeding; no power of compromise; no capacity to receive, or to act, upon *instructions*, in opposition to what *they* themselves conceived, to be the *plain* meaning of the instrument before them.

The general views, with which the two nations had settled the article, seemed, to them, to be very apparent. With a view to particular cases, the object was the dispensation of *justice*, according to the special merits, of every distinct case; either by an award of compensation, where the complaint of injury, from past delay, was well founded; or, by a conclusive re-



jection of the demand, putting it to silence forever, if it appeared to be groundless—and, in either case, *dispatch* was essential; a *dilatory cure for past delay*, being a mockery in terms, as well as in effect; and a *speedy* rejection of ill founded complaints, amounting to no more than strict justice, to the rights and character, of the party charged.—In a larger view, the object was, a termination by means, which neither of the two nations could controul, of a complicated dispute between them; such, as they could not themselves decide: a radical remedy for an old sore, which had long rankled in the hearts, and interrupted the confidential intercourse, of many of the most valuable subjects of both.—In construing the article, a majority of the Board was therefore well convinced, that every opinion which tended to uncertainty, indecision, and delay, was most essentially erroneous: that every proceeding, which went to convert a solemn national arbitration, for the known and declared purpose of *final* settlement, into the worst species of protracted negotiation, was totally inadmissible under the treaty.

A bare perusal of the article; every line of which anticipated the occurrence of difference of opinion; (unavoidable, as from the variety of involved matter to be settled, it certainly was);—which provided for it, not only in express terms, by declaring that the opinion of the *majority* should, “*in all cases*, both “as to the *justice of the complaint*, and the amount “of the sum to be paid, be final and conclusive;” but also, by the structure and conformation of the Board, which was made to consist of an unequal number of members (either five or three,) for the very purpose of giving *certainly of decision*, in all cases whatsoever; in cases of division, as well as unanimity—was sufficient to prevent, as they conceived, the possibility, of any serious apprehensions, that mere *difference of opinion*, on any subject, whether it respected the *justice of the claim* within the meaning of the treaty, or the



amount of the damages incurred, could be made a pretext, for disappointing the whole spirit, as well as, the letter of the article.

They believed, that as neither of the two nations could be supposed capable, of appointing men to the confidential situation of national arbitrators, to decide upon a subject, so extensive and involved, and with powers so absolute, as to offer ample means of secret perversion and abuse; such as might be practised with so much plausibility of appearance, and *good agreement*, among themselves, as to prevent detection, or even general censure; nay, perhaps, to attract applause:—as neither of the two nations were capable of appointing men to such a situation of important trust, without the recommendation of unblemished reputation, and competent ability, there was, in the characters of such men, and the assurance of an oath, the only guarantee for just and impartial determination, which the imperfect state of human affairs can afford.

Finally, for themselves, they did certainly, without the consciousness of much arrogance, conceive, that opinions, which the parties had *invited*, and called upon them, solemnly, to declare upon oath, according to the best of their judgment, were, when so declared, to be received, by those parties, with respect,—while they determined, by their conduct, and a fair disclosure of their principles,\* to disprove the surmise

\* The task they imposed upon themselves, of stating the general grounds and course of reasoning on which their resolutions, or opinions, were founded, arose chiefly from this consideration. It had, besides, the effect to inform parties and agents, on the one side and the other, of the principles, on which the Board would proceed, in similar cases; the advantage of which, in point of order and dispatch, is apparent.

Certain it is, that no set of men who were not conscious of meaning well, and did not hold their reasons to be such as *ought* to be satisfactory, would ever have adopted this practice. The *fiat* of a single line must in that case, have been far more safe and convenient.

One word more on the course of their proceedings:—if a majority of the Board had been disposed to keep up the machinery of the commission as an engine of policy, *decently*, to suspend for a convenient

(which, if just, would have suggested a simple mode, for a dissatisfied party, to suspend, or invalidate, the decisions of every set of arbitrators, who could be chosen,) that because they had been unjustly reproached, and were therefore displeased, they could no longer be considered, as capable of impartial deliberation.

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THE last proceeding of the Board was the motion, which has been reported, in the case of Robert Williams, on the 17th of July.—

The Commissioners of His Britannic Majesty, and the fifth Commissioner, attended, as usual, on the next day of sitting, when the Secretary delivered to them a letter, from the two American Commission-

length of time, the determination of the claims before them, they would have done, what indeed had (perhaps very innocently) been proposed,—they would have *begun* in every case, with an investigation and course of discussion and evidence, on every item, of every account, and *ended*, (after the expiration perhaps of many years,) with the question, how far those claims were at all admissible, under the treaty? they would in silence have passed over the general objections of the United States, on facts which were admitted, and might be conclusive, in order, to exercise their own diligence, and the patience of all concerned, in the examination of accounts and evidence, (at no small expence to the parties) which might, in the end, be found to have had no title to their consideration.—

They proceeded on a different system; deciding all general objections first; in the order suggested by the extent of their influence on other cases: and they did so, with as much diligence, as the inferior matters of common routine, the interruptions occasioned by the prevalence of the yellow fever, (during which however they made no adjournment,) and *other interruptions*, would permit. Two more general questions only, remained to be determined.

The investigation of disputed facts, including the proof of debts, (which might possibly have proved fatal to many claims) would have been carried on upon a plan of proceeding, already in the course of operation, by which that important business might have been correctly finished, within a reasonable period of time.



ers, dated the 19th of July, and addressed to the three other members of the Board; in which the American Commissioners declared a determination, "under the existing circumstances, not to give their "further attendance" in the Board; and promised to explain their motives, in a future communication.

And by another letter, dated the 22d of July, they assured the three other Commissioners, that they would, "without any avoidable delay," communicate the explanation they had promised.

About six weeks after, viz. on the 3d of September, the three other Commissioners did accordingly receive a communication, from the two American Commissioners, in a letter of fifty-five pages, dated on the preceding day, every line of which proved the great difficulty of the subject, even in the hands of men of ability. It referred to, and professed correctly to state, all the differences of opinion, which from first to last had occurred in the Board; ascribing the hardy measure they had adopted, not to one, or a few of those differences, but, equally, to *all*. It was an argument of many words, which terminated at every period, in this simple and conclusive point, that, under the sixth article of the treaty, no opinion in favour of a British subject was good, without the concurrence of the American Commissioners;—or, that by an unfortunate fatality (for no corrupt intention was ascribed to them) *all* the opinions which had been declared by the three other Commissioners, or any of them, *in favour of claimants*, were radically erroneous and bad; while those which they had declared *in favour of the United States*, were perfectly well founded.

The three members of the Commission, who were thus, at once, deprived of all power of performing their functions, on grounds, as now declared, and in a manner, which admitted of little prospect of satisfactory adjustment, did not, (as may perhaps have been expect-



ed,) take their leave.—They had no concern with national considerations:—but many individuals were, in consequence of the Rules and Orders of the Board, either in attendance, or ready to appear, from very distant parts; and as the business was now, notwithstanding the various interruptions which had occurred, so far, in essential matters, advanced; it was desirable to preserve at least the *possibility*, of meeting such a change of measures, as might enable them to bring it to a conclusion.

One of His Britannic Majesty's Commissioners,\* and the fifth Commissioner therefore remained; ready as by their attendance, they officially announced, at all times to assist in the formation of a Board, for the dispatch of business.—But they have never since been met by any Commissioner on the part of this country.

\* Mr. Macdonald intends, however, soon, to take the benefit of a permission, received by the *February Packet*, which puts it in his power to “avail himself of the present suspension in the proceedings of the Commission, of which he is a member, by returning to “England, on leave of absence.”



## APPENDIX.



# APPENDIX.



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## APPENDIX.

### No. I.

*Articles first, fourth, fifth, and sixth of the Definitive Treaty of Peace, between His Britannic Majesty, and the United States of America, signed at Paris the 3d of September, 1783.*

Art. *first*. “HIS Britannic Majesty acknowledges the said United States, viz. New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be Free, Sovereign, and Independent States; that He treats with them as such; and for Himself, His Heirs, and Successors, relinquishes all Claims to the Government, Propriety and Territorial Rights of the same, and every Part thereof.

Art. *fourth*. “It is agreed, That Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all *bona fide* Debts heretofore contracted.

Art. *fifth*. “It is agreed, That Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the Restitution of all Estates, Rights and Properties which have been confiscated, belonging to real *British* Subjects: And also of the Estates, Rights and Properties of Persons resident in Districts in the Possession of His Majesty's Arms, and who have not borne Arms against the said United States: And that Persons of any other Description shall have free Liberty to go to any Part or Parts of any of the Thirteen United States, and therein to remain Twelve Months unmolested in their Endeavours to obtain the Restitution of such of their Estates, Rights and Properties as may have been confiscated: And that Congress shall also earnestly recommend to the several States, a Reconsideration and Revision of all Acts or Laws regarding the Premises, so as to render the said Laws or Acts perfectly consistent, not only with Justice and Equity, but with that Spirit of Conciliation, which, on the Return of the Blessings of Peace, should universally prevail. And that Congress shall also earnestly recommend to the several States, that the Estates, Rights and Properties of such last-mentioned Persons shall be restored to them, they refunding to any Persons who may be now in Possession the *bona fide* Price (where any has been given) which such Persons may have paid on purchasing any of the said Lands, Rights or Properties since the Confiscation.

“And it is agreed, That all Persons who have any Interest in confiscated Lands, either by Debts, Marriage Settlements, or o-

therwise, shall meet with no lawful Impediment in the Prosecution of their just Rights.

Art. *sixth*. "That there shall be no future Confiscations made, nor any Prosecutions commenced against any Person or Persons, for or by Reason of the Part which he or they may have taken in the present War; and that no Person shall on that Account suffer any future Loss or Damage either in his Person, Liberty or Property; and that those who may be in Confinement on such Charges at the Time of the Ratification of the Treaty in *America*, shall be immediately set at Liberty, and the Prosecutions so commenced be discontinued.



## No. II.

*Articles sixth, seventh, eighth, tenth, and part of the twenty eighth and last articles of the Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty, and the United States of America; concluded at Westminster the 19th day of November 1794, with the President's Proclamation announcing the Ratification thereof—*

Art. *sixth*. "Whereas it is alledged by divers British merchants, and others His Majesty's subjects, that debts to a considerable amount, which were *bona fide* contracted before the peace, still remain owing to them by citizens or inhabitants of the United States, and that by the operation of various lawful impediments since the peace, not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive full and adequate compensation for the losses and damages which they have thereby sustained: It is agreed, that in all such cases where full compensation for such losses and damages cannot for whatever reason be actually obtained, had and received by the said creditors in the ordinary course of justice, the United States will make full and complete compensation for the same to the said creditors: But it is distinctly understood, that this provision is to extend to such losses only as have been occasioned by the lawful impediments aforesaid; and is not to extend to losses occasioned by such insolvency of the debtors, or other causes as would equally have operated to produce such loss, if the said impediments had not existed; nor to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the claimant.

"For the purpose of ascertaining the amount of any such losses and damages, *five* Commissioners shall be appointed, and authorised to meet and act in manner following, viz. Two of them shall be appointed by His Majesty, two of them by the President of the United States by and with the advice and consent of the Senate thereof, and the fifth by the unanimous voice of the other four; and if they should not agree in such choice, then the Commission-



ers named by the two parties shall respectively propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the four original Commissioners.—When the five Commissioners thus appointed shall first meet, they shall, before they proceed to act, respectively take the following oath or affirmation, in the presence of each other, which oath or affirmation being so taken and duly attested, shall be entered on the record of their proceedings, viz. I, *AB*, one of the Commissioners appointed in pursuance of the sixth article of the treaty of amity, commerce, and navigation, between His Britannic Majesty and the United States of America, do solemnly swear (or affirm) that I will honestly, diligently, impartially, and carefully examine, and to the best of my judgment, according to justice and equity, *decide* all such complaints, as under the said article shall be preferred to the said Commissioners; and that I will forbear to act as a Commissioner, in any case in which I may be personally interested.

“ *Three* of the said Commissioners shall constitute a Board, and shall have power to do any act appertaining to the said Commission, provided that one of the Commissioners named on each side, and the fifth Commissioner shall be present, *and all decisions shall be made by the majority of the voices of the Commissioners then present*; eighteen months from the day on which the said Commissioners shall form a Board, and be ready to proceed to business, are assigned for receiving complaints and applications; but they are nevertheless authorized, in any particular cases in which it shall appear to them to be reasonable and just, to extend the said term of eighteen months, for any term not exceeding six months, after the expiration thereof. The said Commissioners shall first meet at Philadelphia, but they shall have power to adjourn from place to place as they shall see cause.

“ The said Commissioners in examining the complaints and applications so preferred to them, are empowered and required, in pursuance of the true intent and meaning of this article, to take into their consideration all claims, whether of principal or interest, or balances of principal and interest, and to determine the same respectively, according to the merits of the several cases, due regard being had to all the circumstances thereof, and as equity and justice shall appear to them to require. And the said Commissioners shall have power to examine all such persons as shall come before them, on oath or affirmation touching the premises; and also to receive in evidence according as they may think most consistent with equity and justice, all written depositions, or books, or papers, or copies, or extracts thereof; every such deposition, book, or paper, or copy, or extract, being duly authenticated, either according to the legal forms now respectively existing in the two countries, or in such other manner as the said Commissioners shall see cause to require or allow.

“ *The award of the said Commissioners, or of any three of them, as aforesaid, shall in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the creditor or claimant*: And the United States undertake to cause the sum so awarded to be paid in specie to such creditor or claimant



without deduction ; and at such time or times, and at such place or places as shall be awarded by the said Commissioners ; and on condition of such releases or assignments to be given by the creditor or claimant, as by the said Commissioners may be directed : Provided always that no such payment shall be fixed by the said Commissioners to take place sooner than twelve months from the day of the exchange of the ratifications of this treaty."

Art. *seventh*. "Whereas complaints have been made by divers merchants and others, citizens of the United States, that during the course of the war in which His Majesty is now engaged, they have sustained considerable losses and damage, by reason of irregular or illegal captures or condemnations of their vessels and other property, under colour of authority or commissions from His Majesty, and that from various circumstances belonging to the said cases, adequate compensation for the losses and damages so sustained cannot now be actually obtained, had and received by the ordinary course of judicial proceedings ; it is agreed, that in all such cases, where adequate compensation cannot, for whatever reason, be now actually obtained, had and received by the said merchants and others in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the said complainants. But it is distinctly understood, that this provision is not to extend to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the claimant.

"That for the purpose of ascertaining the amount of any such losses and damages, five Commissioners shall be appointed and authorized to act in London, exactly in the manner directed with respect to those mentioned in the preceding article," &c. &c. &c.

Art. *eighth*. "It is further agreed, that the Commissioners mentioned in this and in the two preceding articles shall be respectively paid in such manner as shall be agreed between the two parties ; such agreement being to be settled at the time of the exchange of the ratifications of this treaty. And all other expences attending the said commissions shall be defrayed jointly by the two parties, the same being previously ascertained and allowed by the majority of the Commissioners. And in the case of death, sickness or *necessary absence*, the place of every such Commissioner respectively shall be supplied in the same manner as such Commissioner was first appointed, and the new Commissioners shall take the same oath or affirmation and do the same duties."

Art. *tenth*. "Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies which they may have in the public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated ; *it being unjust and impolitic* that debts and engagements contracted and made by individuals having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents."

Art. *twenty-eighth*. "It is agreed, that the first ten articles of this treaty shall be permanent, and that the subsequent articles,

except the twelfth, shall be limited in their duration to twelve years, to be computed from the day on which the ratifications of this treaty shall be exchanged."

*Lastly.* "This treaty, when the same shall have been ratified by His Majesty, and by the President of the United States, by and with the advice and consent of their Senate, and the respective ratifications mutually exchanged, shall be binding and obligatory on His Majesty and on the said States, and shall be by them respectively executed, and observed, with punctuality and the most sincere regard to good faith; and whereas it will be expedient, in order the better to facilitate intercourse and obviate difficulties, that *other articles* be proposed and added to this treaty, which articles, from want of time and other circumstances, cannot now be perfected—it is agreed, that the said parties will, from time to time, readily treat of and concerning such articles, and will sincerely endeavour so to form them, as that they may conduce to mutual convenience, and tend to promote mutual satisfaction and friendship; and that the said articles, after having been duly ratified, shall be added to, and make a part of this treaty. In faith whereof, &c. &c."

#### PROCLAMATION by the PRESIDENT.

"WHEREAS a Treaty, &c. &c. "And whereas the said Treaty with the additional article which (together constitute one Treaty) has by Me on the one part, and by His Britannic Majesty on the other, been duly approved and ratified; and the ratifications were duly exchanged at London on the 28th day of October one thousand seven hundred and ninety five: Now therefore, to the end that the said Treaty may be executed and observed with punctuality and the most sincere regard to good faith, on the part of the United States, I hereby make known the premises; and *enjoin and require all persons bearing office civil or military*, within the United States, and all others, citizens or inhabitants thereof, or being within the same, *to execute and observe* the said Treaty accordingly.—Dated the 29th of February, 1796."



#### No. III.

*Minutes of the opening, and reciprocal communication, by the British and American Commissioners, of their respective Commissions; and of the appointment of a fifth Commissioner.*

"THE Commissioners appointed by His Britannic Majesty, viz. Thomas Macdonald and Henry Pye Rich; and the Commissioners appointed by the President of the United States of America, with the advice and consent of the Senate thereof, viz. Thomas Fitzsimons and James Innes, having met at Philadelphia this eighteenth day of May, One thousand seven hundred and ninety seven, for the purpose of proceeding jointly, to open their respective commissions, did accordingly open the same, and communicate them to each other; the said Commissions being in the following terms, viz.



## COMMISSION by His BRITANNIC MAJESTY.

“GEORGE R.

GEORGE, by the Grace of God King of Great Britain, France, and Ireland, Defender of the Faith, Duke of Brunswick and Lunenburgh, Arch Treasurer and Prince Elector of the Holy Roman Empire, &c. &c. To all to whom these Presents shall come, Greeting. Whereas by the sixth Article of the Treaty of Amity, Commerce and Navigation, concluded at Westminster, on the nineteenth day of November, One thousand seven hundred and ninety four, between us and our good friends the United States of America, provision is made for the appointment of Commissioners, in the manner, and for the purposes therein mentioned. Now KNOW YE, that we reposing especial trust and confidence in the wisdom, diligence, and integrity of our trusty and well beloved Thomas Macdonald, and Henry Pye Rich, Esquires, have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint, the said Thomas Macdonald, and Henry Pye Rich, Esquires, to be Our Commissioners, appointed by Us under the said article. And we do hereby authorize and require the said Thomas Macdonald, and Henry Pye Rich, Esquires, to meet the two Commissioners appointed or to be appointed on the part of the United States, under the said article, and with them to agree, or otherwise determine, on the appointment of a fifth Commissioner, in the manner directed by the said article; and thereupon to proceed, together with the other Commissioners, honestly, diligently, impartially, and carefully, to examine, and to the best of their judgment, according to justice and equity decide, all such complaints as under the said article shall be duly preferred to the said Commissioners,—and generally to do and perform, agreeably to the true intent and meaning of the said article, all such acts as shall be necessary to be done on the part of our Commissioners, to carry the same into complete execution. IN TESTIMONY and confirmation of all which, we have caused our Great Seal of Great Britain to be affixed to these presents, signed with our Royal hand.—Given at our Palace, at St. James's, this seventh day of September, in the Year of our Lord, One thousand seven hundred and ninety six, and in the thirty sixth of our reign.

By His Majesty's Command

(signed)

GRENVILLE.”

## COMMISSION by the PRESIDENT of the UNITED STATES.

GEORGE WASHINGTON PRESIDENT of the UNITED STATES of AMERICA.

“To all who shall see these presents, Greeting.

“WHEREAS it is alledged\* by divers British merchants, and others, the subjects of His Britannic Majesty, that debts to a confi-

\* The subsequent Commission to Mr. Sitgreaves, on the death of Mr. Innes, contains the following additional words in the introduction, “whereas it is stated “in the sixth article of the treaty of amity, &c. that it is alledged.”



derable amount, which were *bona fide* contracted before the peace, between the United States and His said Majesty, still remain owing to them by citizens or inhabitants of the United States, and that by the operation of various lawful impediments since the peace, not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances impaired and lessened, so that by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive full and adequate compensation for the losses and damages which they have thereby sustained, and whereas in the sixth article of the Treaty of Amity, Commerce, and Navigation, between the United States and His Britannic Majesty, it is agreed, for the purpose of ascertaining the amount of any such losses and damages, that five Commissioners shall be appointed, and authorized, to meet and act in the manner therein set forth, two of which Commissioners to be appointed by His said Majesty, and two by the President of the United States by and with the advice and consent of the Senate thereof, and the fifth in the manner in the said article directed.—Now KNOW YE, that reposing special trust and confidence in the integrity and abilities of Thomas Fitzsimons, of Pennsylvania, and James Innes, of Virginia, I have nominated, and, by and with the advice and consent of the Senate, appointed the said Thomas Fitzsimons, and James Innes, Commissioners, with full powers to meet the Commissioners appointed by His Britannic Majesty, and with them to agree, or otherwise determine, on the appointment of a fifth Commissioner, in the manner directed in the said sixth article, and thereupon, having taken the oath or affirmation in that article prescribed, to proceed to examine, and according to justice and equity decide, all such complaints as, under the said sixth article shall be preferred to them, and agreeably to the true intent and meaning thereof, generally to do all those acts, which shall be necessary to carry the said article into complete execution.

“ IN TESTIMONY whereof I have caused these Letters to be made patent, and the Seal of the United States to be hereunto affixed.

“ GIVEN under my hand at the City of Philadelphia, this first day of April in the year of our Lord, One thousand seven hundred and ninety six, and of the Independence of the United States the twentieth.

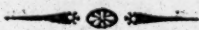
(signed) G. WASHINGTON.  
By the President  
(signed) TIMOTHY PICKERING,  
Secretary of State.

“ Which Commissions the said Commissioners respectively found to be in due form, and agreed to meet upon Thursday next, the 25th day of May, current, for the purpose of proceeding to the consideration of a proper person to be appointed or chosen as a

fifth Commissioner, pursuant to, and in the manner provided for, by the said sixth article of the said Treaty.

(signed)

THOS. MACDONALD.  
HENRY PYE RICH,  
THOS. FITZSIMONS.  
JAMES INNES."



Thursday, 25th of May, 1797.

"THE said Commissioners, viz, Thomas Macdonald, and Henry Pye Rich, appointed by His Britannic Majesty; and Thomas Fitzsimons, and James Innes, appointed by the President of the United States, as aforesaid; having upon the 18th day of May, current, opened and communicated to each other their respective Commissions, which were found to be in due form; and agreed to meet this day for the special purpose after mentioned, did accordingly meet, and endeavour to agree in the choice of a fifth Commissioner, pursuant to the said Treaty. But finding that they could not so agree, the said Commissioners appointed by His Britannic Majesty did propose,\* *John Guillemard*, Esquire, of London, at present in Philadelphia, and the said Commissioners appointed by the President of the United States, as aforesaid, did propose *Fisher Ames*, Esquire, of Massachusetts; and the said Henry Pye Rich, and James Innes, having retired into another room,† the

\* As it was natural to attach considerable importance to the circumstance, which chance was thus to determine, whether three of the five Commissioners should be British subjects or American citizens, a very satisfactory course of proceeding, which had been practised by the Commission under the *seventh* article, sitting at London, was here adopted. The British Commissioners had, some days before, delivered to the American Commissioners, a list of three British subjects, then in America, of whom the American Commissioners were to chuse one, to be proposed by the British Commissioners for the situation of fifth, or additional Commissioner, to make up the full number prescribed by the treaty; the British Commissioners having received from the American Commissioners, a similar list of three American citizens, of whom the British Commissioners were to chuse one, to be in like manner proposed by the American Commissioners. The British Commissioners selected Mr. Ames from the list of American citizens, and the American Commissioners selected Mr. Guillemard from the list of British subjects; who were respectively proposed accordingly, in the manner here stated;— And thus, though the appointment was ultimately made by lot, the person so appointed, was, to a certain degree, chosen by the election of both parties.

† Mr. Pickering, Secretary of state, who attended, also retired into the other room, where he witnessed the drawing of the lot.

Mr. Guillemard having on the 29th of May attended, and notified his acceptance, the oath prescribed by the article, was on the same day, taken by all the five Commissioners, in the presence of each other, and before the President of the Court of Common Pleas, for the first district of Pennsylvania, who met them at their Office for that purpose. On that day, therefore, the Board was constituted, pursuant to the Treaty.



said Thomas Macdonald, and Thomas Fitzsimons, wrote down the names of the said two persons so proposed, on separate slips of paper, which being rolled up, and placed in an urn, were carried in the same, by the said Thomas Macdonald, and Thomas Fitzsimons, into the presence of the said other two Commissioners; and the urn being there delivered to the said James Innes, was by him presented to the said Henry Pye Rich, who, in the presence of the said other Commissioners, drew from the same, the name of the said John Guillemard, who was declared the Fifth Commissioner, under the said article of the said Treaty.—These things were so done at Philadelphia, and in the house of the said Thomas Fitzsimons, this twenty fifth day of May, One thousand seven hundred and ninety seven.

(signed)

THOS. MACDONALD.  
HENRY PYE RICH.  
THOS. FITZSIMONS.  
JAS. INNES.

#### No. IV.

#### Opinions of Judges.\*

##### 1. *The general object of the fourth article of the treaty of peace.—*

Judge PATERSON.—“ The traders and others of this country, were largely indebted to the merchants of Great Britain. To provide for the payment of these debts and give satisfaction to this class of subjects, must have been a matter of primary importance to the British ministry. This doubtless is at all times, and in all situations, an object of moment to a commercial country. The opulence, resources, and power of the British nation may in no small degree be ascribed to its commerce: it is a nation of manufacturers and merchants. To protect their interests, and provide for the payment of debts due to them, especially *when those debts amounted to an immense sum*, could not fail of arresting the attention, and calling forth the utmost exertions of the British Cabinet. A measure of this kind, it is easy to perceive, would be pursued

\* The opinions here referred to, of Judges Chase, Paterson, Wilson, and Cushing, were delivered in the Supreme Court of the United States, after the treaty of amity, in the case of *Warre* administrator of *Jones*, plaintiff in error, against *Hylton* and others, decided in February 1796: reported 3 Dallas, 199:—those of Chief Justice *Elsworth*, and Judge *Sigreeves*, in the Circuit Court of the United States, for the district of North Carolina, in deciding the case of *Hamiltons* against *Eaton*, in June 1796,—as stated in a printed report, published in North Carolina, and admitted to be correct.

with unremitting diligence and ardour. *Sacrifices would be made to insure its success; and perhaps nothing short of extreme necessity would induce them to give it up.*"

2. *The contracts and debts of individuals not affected by the war;—the article in that respect to be construed with the utmost latitude:—interest as much part of the debt as the principal.*—

Judge PATERSON.—“ I feel no hesitation in declaring, that it has always appeared to me to be incompatible with the principles of justice and policy, that contracts entered into by individuals of different nations should be violated by their respective governments in consequence of national quarrels and hostilities—*National differences should not affect private bargains.* The confidence both of an individual and national nature on which the contracts were founded, ought to be preserved inviolate. Is not this the language of honesty and honour? Does not the sentiment correspond with the sentiments of justice and the dictates of the moral sense? In short, is it not the result of right reason and natural equity? The relation which the parties stood in to each other at the time of contracting these debts ought not to pass without notice. The debts were contracted when the creditors and debtors were subjects of the same King and children of the same family. They were made under the sanction of laws common to, and binding on both. *A revolutionary war could not, like other wars, be foreseen or calculated upon:—The thing was improbable:—No one at the time debts were contracted had any idea of a severance or dismemberment of the empire, by which persons who had been united under one system of civil polity should be torn asunder, and become enemies, for a time, and perhaps aliens for ever. Contracts entered into in such a state of things ought to be sacredly regarded.—Inviolability seems to be attached to them:—“ The construction of a treaty made in favour of such creditors, and for the restoration and enforcement of pre-existing contracts ought to be liberal and benign:—For these reasons this clause in the treaty deserves the utmost latitude of exposition:—*”

Judge SHIPPEN (now Chief Justice of Pennsylvania.) “ The five thousand pounds paid *with interest*, at this day, is not, in fact or law, more than the five thousand pounds, paid without interest, at the day it becomes due”.—2 Dallas Rep. 255

3. *The fourth article of the treaty of peace, clear and unambiguous; and not connected with the fifth.*

Judge PATERSON.—“ The fourth article of the treaty gives the text, and runs in the following words: “ It is agreed that “ all creditors, on either side shall meet with no lawful impedi-



“ ments to the recovery of the full value in sterling money of all  
 “ *bona fide* debts heretofore contracted.” The phraseology made  
 use of leaves, in my mind, no room to hesitate, as to the intention  
 of the parties. The terms are *unequivocal* and universal in their  
 signification; and obviously point to, and comprehend all credi-  
 tors and all debtors, previously to the 3d of September 1783. In  
 this article there appears to be a *selection of expressions, plain and*  
*extensive in their import, and admirably calculated to obviate doubts,*  
*to remove difficulties, to designate the objects, and ascertain the inten-*  
*tion of the contending powers; and in short, to meet and provide*  
*for all possible cases that could arise under the head of debts.”*

Judge CUSHING.—“ The words are as strong as the wit of man  
 could devise, to avoid all effects of sequestration, confiscation,” &c.

Judge SITGREAVES.—“ *Vattel* says, p. 369. ‘ When an act  
 is conceived in clear and positive terms; when the sense is mani-  
 fest, and leads to nothing absurd, there can be no reason to refuse  
 the sense which the treaty naturally presents.—To go elsewhere in  
 search of conjectures, in order to extinguish or restrain it, is to  
 endeavour to elude it.’—

“ The fourth article contains the *only* stipulation with respect  
 to *debts*, in the whole instrument. It is mutual and general in  
 its expression; not limited or restrained by any particular words to  
 any description of persons, as is evident in the fifth article. If  
 that had been in the contemplation of the parties, they could not  
 have overlooked the necessity for these distinctions—nor are we at  
 liberty to presume it. In the next article (the fifth) the distinction  
 is made with great accuracy with regard to those, who endea-  
 vour to procure a restitution of their lands and other property.”

4. *The benefit of the fourth article of the treaty of peace extend-*  
*ed to all descriptions of creditors, without distinction.*

See the opinion immediately preceding.—

Judge PATERSON.—“ The terms are unequivocal, &c. and  
 obviously point to, and comprehend *all creditors*, and all debtors  
 previously to the 3d of September 1783.”—“ The words *credi-*  
*tors on either side, embrace every description of creditors*”—“ No  
 line should be drawn between creditors, unless it be found in the *trea-*  
*ty. The treaty does not make it.* The truth is, that none was in-  
 tended, or it would have been expressed. The indefinite and  
 sweeping terms made use of by the parties, such as, “ creditors  
 “ on either side,” “ no lawful impediment to the recovery of  
 “ the full value in sterling money of all debts heretofore contract-  
*ed,”* exclude the idea of any class of cases having been in-  
 tended to be excepted, and explode the doctrine of *constructive*

*discrimination.*"—"All the creditors on either side without distinction, must have been contemplated by the parties in the fourth article."

5. *The fourth article of the treaty of peace not confined to debts existing at the date of the treaty.*

Judge WILSON.—"The fourth article is well expressed to meet the very case;" (the case of a British debt which had been *legally* extinguished, *before* the treaty, by payment into a state treasury, pursuant to law, and which was held to amount to confiscation) —"It is not confined to debts *existing at the time of making the treaty*, but it is extended to debts *theretofore* contracted."

Judge PATERSON.—"The fourth article extends to all *pre-existing debts*."

6. *All confiscations; payments in paper money; and every thing done under the law to prevent, impede, or impair the recovery of British debts, set aside by the fourth article of the treaty of peace; which had a retrospective operation.*

Judge WILSON.—"By every nation, whatever is its form of government, the *confiscation of debts* has long been considered *disreputable*.\* And we know that not a single confiscation, *of that kind*, stained the code of any of the European Powers who were engaged in the war which our revolution produced. Nor did any authority for the confiscation of *debts* proceed from Congress (that body which clearly possessed the right of confiscation, as an incident of the powers of war and peace;) and therefore in no instance can the act of confiscation be considered as the act of the nation. But even if Virginia had the power to confiscate, *the treaty annuls the confiscation*."

Chief Justice ELLSWORTH.—"Civil war which terminates in a severance of empire, does perhaps, less than any other, justify the confiscation of *debts*; because of the special relation and confidence subsisting at the time they were contracted"—"North Carolina however judging for herself in a moment of severe pressure,

\* The two nations have in the tenth article of the treaty of amity agreed in reprobating this injustice done to individuals, in these words, "it being unjust and impolitic, that debts and engagements contracted and made by individuals having confidence in each other, and in their respective governments, should ever be destroyed or impaired by national authority, on account of national differences and discontents."



exercised the sovereign power of passing an act of confiscation, which extended among others, to the debts of the plaintiffs.”—

“The *treaty* is now the law in this state; and the *confiscation act*, so far as the treaty interferes with it, is *annulled*. Still it is urged, that annulling the confiscation act cannot annul the defendants’ right of discharge, *acquired while the act was in force*. It is true, the repeal of a law does not make void what has been well done under it: but it is also true, admitting the right here claimed by the defendant to be as substantial as a right of property can be, that he may be deprived of it, *if the treaty so requires*. It is justifiable and frequent, in the adjustment of national differences, to concede, for the safety of the state, the rights of individuals.”

Judge CUSHING.—“The words are as strong as the wit of man could devise to avoid all effects of sequestration, *confiscation*, or *any other obstacle* thrown in the way by any law, particularly pointed against the recovery of such debts.”

Judge CHASE.—“These words (the words of the fourth article) have both a *retrospective* and future aspect.”—“The fourth article did intend to destroy all lawful impediments, *past and future*”—“The stipulation could not intend *only* to repeal laws that created legal impediments to the recovery of the debt, (without respect to the mode of payment) because the mere repeal of a law would not destroy *acts done*, and *rights acquired* under the law, during its existence before the repeal.” “The legislatures of the states have often exercised the power of impairing, and in some instances, almost *annihilating*, the *obligation of contracts*; as by *tender laws*, which made an offer to pay, and a refusal to receive *paper money*, for a specie debt, an extinguishment, to the amount tendered.”—“It is admitted that the treaty intended, and did annul some of the laws of the states, to wit, any laws, *past or future*, that authorised a tender of *paper money*, to *extinguish* or discharge the debt, &c. &c. because if the words “*sterling money*” have not this effect, it cannot be shewn that they have any other. If the treaty could nullify some laws, it will be difficult to maintain that it could not equally annul others.”

Judge CUSHING.—“The plain and obvious meaning of it goes to *nullify ab initio* all laws, or the *impediments of any law*, as far as they might have been designed to impair or impede the creditors right or remedy against the original debtor.”

Judge PATERSON.—“The words, “shall meet with no lawful “impediment,” refer to legislative acts, and *every thing done under them*, so far as the creditor might be affected, or obstructed, in regard either to his remedy or right. All lawful impediments of whatever kind they might be, whether they related to personal disabilities, or *confiscations*, sequestrations, or payments into loan offices or treasuries, *are removed*. No act of any state legislature, and no payment made under such act, into the public coffers, shall

obstruct the creditor in the course of recovery against his debtor. The act itself is a lawful impediment and therefore repealed: *the payment under the act is also a lawful impediment, and therefore is made void.* The article is to be construed according to the subject matter or nature of the impediment; it repeals in the first instance, and *nullifies in the second.* "It stipulates that the creditor shall recover the full value of his debt in sterling money; thereby securing and guarding him *against all payments in paper money.*" "The design unquestionably was to *restore* the creditor and debtor to their original state, and place them *precisely in the situation they would have stood in*, if no war had intervened, or act of the Legislature of Virginia, had been passed. The impediments created by legislative acts, and *the payments made in pursuance of them, and all the evils growing out of them*, were so far as respected creditors done away and cured." "The article *reinstates* the parties; the creditor and debtor *before the war*, are creditor and debtor since. *As they stood then they stand now.*

—"To prevent mistakes it is to be understood, that my argument embraces none but lawful impediments within the meaning of the treaty, *such as* legislative acts, and payments under them into loan offices and treasuries. An impediment created by law, stands on different ground from an impediment created by the creditor."\*

7. *A Plea may be a lawful impediment within the meaning of the treaty of peace.*

Judge CHASE.—"Shall meet with no lawful impediment" to "the recovery;" that is to the right of action, judgment, and execution, and receipt of the money, without impediments *in the courts of justice*; which could only be by *Plea* (as in the present case) or by proceedings after judgment, to compel receipt of paper money or property, instead of sterling money. The word *recovery* is very comprehensive, and operates in the present case, to give remedy from the commencement of the suit to the receipt of the money."—"I consider the fourth article in this light, that it is not a stipulation that *certain acts* shall be done, and that it was necessary for the legislatures of individual states to do those acts: but that it is an express agreement, that *certain things shall not be permitted in the American courts of justice*; and that it is a contract on behalf of those courts, *that they will not allow such acts to be pleaded in bar*, to prevent a recovery of certain *British* debts. As creditors can only sue for the recovery of their debts

\* The above general sentences, which thus conclude the learned Judges argument in the report, contain positions which never can be disputed, and take nothing from the force of the principles *before* laid down. The report was not published till after the resolution of the Board in the case of *Dulany*, where they held the impediment to arise *not from the act of the creditor*, but of the law.



in courts of justice, and it is only in courts of justice, that a legal impediment can be set up by way of *plea*, in bar of their actions, it appears to me, that the courts are bound to *over rule* every such plea if contrary to the treaty. A recovery of a debt can only be prevented by a plea in bar to the action."

8. *Operation of legislative acts in South Carolina, passed since the peace, against the recovery of debts.*

Judges MATHEWS and RUTLEDGE, in their decree, (as appears from an attested copy) in the court of Chancery of South Carolina, in the case of *Greenwood and Higginson, versus Air and others*, dated the 20th of March 1795; where the question was, whether the complainants (British subjects) were guilty of *laches* or negligence, in not proceeding to recover payment of the debt? declared as follows, "As to the time which elapsed since 1774 to the present period, that is easily accounted for. From 1774 to 1783, the war prevented any thing being done; and from 1783 till 1793, the repeated interferences of the legislature, between creditors and debtors, made it altogether impossible to recover debts, during that time."—

9. On the subject of certain positions which had been maintained on the part of the United States, and were noticed in the second resolution in the case of *Allen*, it appears, that Federal Judges had, in very strong and unequivocal terms, delivered sentiments, respecting the operation of the *first* article of the treaty of peace, which necessarily led to the same conclusion as that which a majority of the Board, in that case expressed. Besides the opinions of Judges *Chase*, *Paterfon*, and *Pendleton* of Virginia, quoted in that resolution, an observation "on the validity of the treaty of peace" made by Judge *Pendleton* of Georgia, in the Circuit court of the United States, in deciding the case of *Brailsford* and others against *Spalding*, in May 1792, may be referred to, as stated in a printed report of the case, the accuracy of which has not been disputed.

THE END.

...and it is only a matter of time before the law  
will be enforced. In the meantime, the law is  
being enforced in the most effective manner possible.  
The law is being enforced in the most effective manner possible.  
The law is being enforced in the most effective manner possible.

[illegible]



